any discussion of *Erie* or its analysis of the distinction between federal procedural law and state substantive law.

Nearly twenty-five years later, the Supreme Court again considered the applicability of a federal rule over a conflicting state law in *Hanna v. Plumer*, 380 U.S. 460 (1965). The question in *Hanna* was whether Rule 4 of the Federal Rules of Civil Procedure governed service of process, or whether service should be governed by a conflicting state law. *Id*. at 461. The district court below, relying on *Guaranty Trust* and other cases applying an outcome-determinative test for determining whether to apply state law, concluded that the state service rule was substantive and should apply in federal court over Federal Rule 4. *Id*. at 462-63.

After a lengthy explication of the *Erie* doctrine and the outcome-determinative test established by *Guaranty Trust*, *see id*. at 465-69, the Supreme Court confirmed in *Hanna* that *when a federal rule applies, the Erie doctrine and its outcome-determinative test is inapplicable,* stating:

> There is, however, a more *fundamental flaw* in respondent's syllogism: the *incorrect assumption* that the rule of Erie R. Co. v. Tompkins constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. *The Erie rule has never been invoked to void a Federal Rule.*

380 U.S. at 469-70 (emphasis added).[5] *Hanna* expressly distinguished *Guaranty Trust's* outcome-determinative test, explaining that "in cases adjudicating the validity of Federal Rules, we have not applied the [*Guaranty Trust*] rule or other refinements of Erie, but have to this day continued to decide questions concerning the scope of the Enabling Act and the constitutionality of specific Federal Rules in light of the distinction set forth in Sibbach." *Id*. at 470-71.

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[5] The Court explicitly recognized the divergence between *Erie* and Enabling Act cases, stating that "the line of cases following Erie diverged markedly from the line construing the Enabling Act. [*Guaranty Trust*] made it clear that Erie-type problems were not to be solved by reference to any traditional or common-sense substantive-procedure distinction . . . ." *Hanna*, 380 U.S. at 465-66.

Hanna further explained that "the development of two separate lines of cases"—one line applying *Erie* and the other determining the validity of federal rules under the Enabling Act—was not accidental:

> The line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'

Id. at 471 (quoting *Guaranty Trust*, 326 U.S. at 108). Because the Enabling Act and the *Erie* doctrine "were designed to control very different sorts of decisions," the tests for applying them are not identical. *Id*. Thus, "[w]hen a situation is covered by one of the Federal Rules, . . . the court has been instructed to apply the Federal Rule, and can refuse to do so *only if* the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." 380 U.S. at 471 (emphasis added). *See also Shady Grove*, 559 U.S. at 406-10 (plurality decision) and 418 (Stevens, J., concurring) (both opinions citing *Hanna*, 380 U.S. at 471).

According to the Court, "[t]o hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to *disembowel* either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act." 380 U.S. at 473-74. *See also Shady Grove*, 559 U.S. at 416 (quoting *Hanna*, 380 U.S. at 473-74) ("The short of the matter is that *a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping*. To hold otherwise would be to 'disembowel either the Constitution's grant of power over federal procedure' or Congress's exercise of it.");[6] *Jones*, 674 F.3d at 1206 (citing *Hanna*,

[6] This quote from *Shady Grove* was joined by the four-justice plurality. Justice Stevens joined a very similar discussion in a different part of the decision. *See Shady Grove*, 559 U.S. at 406 n.7 (citing *Hanna*, 380 U.S. at 469-72) ("[A] Federal Rule that fails *Erie's* forum-shopping test is not *ipso facto* invalid . . . ."). *See also id*. at 431 (Stevens, J., concurring) (applying the "Rules of Decision Act inquiry under *Erie*" when a federal rule governs would "work an end run

380 U.S. at 473-74) ("While application of Rule 38 may affect, to some degree, the outcome of this litigation, that possibility does not preclude the Rule's application.").[7] *See also Gasperini*, 518 U.S. at 432 ("[T]he *Guaranty Trust* 'outcome-determination' test [is] an insufficient guide in cases presenting countervailing federal interests.").

Indeed, *there is a strong presumption in favor of finding federal rules valid under the Enabling Act*. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 6 (1987) (citing *Hanna*, 380 U.S. at 471) ("[T]he study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, . . . gives the Rules *presumptive validity* under both the constitutional and statutory constraints.") (emphasis added); *In re Grand Jury Proceedings*, 616 F.3d 1186, 1197 (10th Cir. 2010) (citing *Burlington N. R.R. Co.*, 480 U.S. at 6) ("[W]e emphasize that the Federal Rules of Appellate Procedure are entitled to a presumption that they comply with the Rules Enabling Act."). This presumption is so strong that, "[t]o date, the Supreme Court never has held any of the rules invalid, despite several attacks against a number of them." 4 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Civil*

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around Congress's system of uniform federal rules . . . and our decision in *Hanna*.") (citations omitted).

[7] The reasons for not applying an outcome-determinative test where a federal rule applies are plain. As one commentator explained:

> Rules of law are inextricably interrelated, and *virtually any rule of procedure*, when enforced, *will directly or indirectly affect numerous "rights"* of the litigants, some of which may be considered '*substantive*.' If incidental impingements on substantive rights were sufficient to render a Civil Rule inoperative, the very objective of the Enabling Act and the Rules themselves would be imperiled. . . . Whatever may be the appropriate construction of 'abridge, enlarge or modify,' presumably it *must accommodate the goal of establishing a comprehensive system of procedure* and allow for such impingements of substantive rights as are reasonably incidental to significant procedural objectives.

19 Fed. Prac. & Proc. Juris. § 4509 (emphasis added).

Procedure (hereinafter "Fed. Prac. & Proc. Civ.") § 1030 (4th ed. 2017). And "[n]o one has yet suggested a persuasive example that requires total invalidation of a Rule." 19 Fed. Prac. & Proc. Juris. § 4509.

Still, despite the clear distinction between *Erie's* outcome-determinative analysis and the Enabling Act test set forth in *Hanna*, the similarity in the language of the Enabling Act and the *Erie* decision has sometimes led to significant confusion among lawyers and lower courts regarding how to separate substance from procedure. As one commentator explained:

> A particular issue may be classified as substantive or procedural in *three different decisional contexts*: when determining whether the matter is within the scope of the federal courts' rulemaking power; when resolving questions of conflict of laws; or when determining whether to apply state law or federal law. *These three contexts present three very different kinds of analytical problems*. Factors that are of decisive importance in making the substance-procedure classification for one context may be irrelevant in the others. *To use the same terminology for all three contexts is an invitation to confusion and a barren and misleading conceptualism, in which a decision classifying a particular issue as substantive in one of these contexts could be misapplied to classify the issue as substantive in another context even though an entirely different purpose and set of considerations are involved*.

19 Fed. Prac. & Proc. Juris. § 4508 (emphasis added).[8]

Up until 2010, when the *Shady Grove* decision was issued, the test for determining whether a federal rule was valid under the Rules Enabling Act was the one set forth in *Sibbach* and applied

[8] Despite this likelihood of confusion, the Supreme Court has continued (confusingly) to use the "substantive" and "procedural" terminology in cases applying both the *Erie* doctrine and the Enabling Act. *See e.g.*, *Shady Grove*, 559 U.S. at 406-07 (using the terms when referencing both *Erie* and the Enabling Act); *Racher*, 871 F.3d at 1162-67 (same). Nevertheless, *both the Supreme Court and Tenth Circuit have consistently held that Erie and its progeny do not establish the test for determining whether a federal rule violates the Enabling Act*. *See e.g.*, *Shady Grove*, 559 U.S. at 398 (citing *Hanna*, 380 U.S. at 469-71) ("We do not wade into *Erie's* murky waters unless the federal rule is inapplicable or invalid."); *Walker*, 446 U.S. at 747-48 (quoting *Hanna*, 380 U.S. at 470) ("The *Erie* rule has never been invoked to void a Federal Rule."); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1192 (10th Cir. 2012) (applicability of a federal rule "obviates the need for any *Erie* analysis"); *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1539-40 (10th Cir. 1996) (quoting *Hanna*, 380 U.S. at 470).

by the *Shady Grove* plurality—whether the federal rule "really regulates procedure." *See* 19 Fed. Prac. & Proc. Juris. § 4509 ("In *Hanna*, the standard endorsed by the Court for determining the validity and applicability of any Civil Rule under the Enabling Act was the test announced in [Sibbach], according to which the critical question is simply whether it 'really regulates procedure.'"). *See also Hanna*, 380 U.S. at 464 (quoting *Sibbach*, 312 U.S. at 14). Under this test, which was applied by the plurality in *Shady Grove*, focus was placed exclusively on the nature and scope of the federal rule. *Shady Grove*, 559 U.S. at 409-410 ("[T]he substantive nature of New York's law *makes no difference*. A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending on whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes). . . . [I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule. *We have held since Sibbach, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure. . . . If it does, it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights*.") (emphasis added). If the rule governs "only 'the manner and the means' by which the litigants' right are 'enforced,' it is valid; if it alters 'the rules of decision by which the court will adjudicate those rights,' it is not." *Id*. at 407 (citations omitted).

In his *Shady Grove* concurrence, Justice Stevens took a more nuanced approach to evaluating whether a federal rule was valid under the Enabling Act, determining that the Enabling Act prohibits only federal rules that "displace a State's definition of its own rights or remedies." *Id*. at 418. According to Justice Stevens, even a state law that is "procedural in the ordinary use of the term" may cause an Enabling Act violation if it "is so intertwined with a state right or remedy that it functions to define the scope of the state-created right." *Id*. at 424. Thus, for Justice Stevens, the question is not whether a state law takes a form that is traditionally described as substantive or

procedural, but instead whether "the state law actually is part of a State's framework of substantive rights or remedies." *Id*. at 419.

Although Justice Stevens's approach is potentially broader in scope, he emphasized that the test established by *Erie* and its progeny should not apply and that the "*the bar for finding an Enabling Act problem is a high one*." *Id*. at 432 (emphasis added). Indeed, Justice Stevens still concluded that New York's statutory bar on class actions could not be applied in federal court, despite the obvious variation it would have had on the outcome of the case.[9] While Justice Stevens's concurrence does not provide clear guidance on how to apply this more nuanced approach, its analysis of the New York statute at issue provides insight into how Justice Stevens likely intended the analysis to proceed.

First, it is evident from Justice Stevens's decision that determining whether a state law is substantive or procedural for purposes of the Enabling Act depends on context, such that "what is procedural in one context may be substantive in another." *Id*. at 428 n.13.

Second, Justice Stevens explained that while a state law that appears procedural "in the ordinary sense" may define a state substantive right or remedy in some contexts, "[t]he mere fact that a state law is *designed as a procedural rule* suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of stated-created rights and remedies."

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[9] Perhaps the most persuasive evidence that *Erie's* outcome-determinative test does not apply when considering the validity of a federal rule is the outcome of the *Shady Grove* decision itself. There, the Court held that Federal Rule 23 guaranteed the plaintiffs a right to proceed against defendant on behalf of a class, despite the apparent applicability of a conflicting New York statute that imposed an outright bar on class actions of the type being pursued. *See Shady Grove*, 559 U.S. at 398-99. Had the New York statute applied, the outcome of the *Shady Grove* case undoubtedly would have been different because the plaintiffs' right to pursue a class action would have been barred as a matter of law. Indeed, had *Guaranty Trust's* outcome-determinative test applied in *Shady Grove*, the result likely would have been the opposite of what the Court held. Thus, it is apparent that determining whether a federal rule violated the Enabling Act cannot turn on whether applying the rule in the face of conflicting state law would affect the outcome of the case.

Id. at 432 (emphasis added). In other words, there is a presumption that a state law that is "designed as a procedural rule" is intended to regulate procedure rather than substance.

Third, the intent of the legislature is relevant, but the mere fact that a state law was adopted for some policy reason does not make the law substantive for purposes of Enabling Act analysis.[10] *Id*. at 433-34 ("In evaluating . . . legislative history, it is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy. Although almost every rule is adopted for some reason and some effect on the outcome of litigation, not every state rule 'defines the dimensions of a claim itself.'") (emphasis in original).

In the end, Justice Stevens concluded that there simply was not enough evidence that the New York statute at issue was adopted for the purpose of defining substantive state rights or remedies and, therefore, application of Federal Rule 23 would not be a violation of the Enabling Act. He based this conclusion on the fact that the defendant's arguments in favor of applying the New York statute rested "on *extensive speculation* about what the New York Legislature had in mind when it created § 901(b)." *Id*. at 436 (emphasis added). Because it was plausible that the New York statute merely reflected "a classically procedural calibration of making it easier to litigate claims in New York courts . . . only when it is necessary to do so, and not making it *too* easy when the class tool is not required," Justice Stevens determined that "Congress' decision that Rule 23 governs class certification in federal courts" should be given respect. *Id*. at 436-37. "*In*

[10] At oral argument, the Court inquired whether it should set aside the context of the specific statute and determine whether the principle at issue (i.e. whether notice should be opt-in or opt-out) was either "strictly procedural or it's substantive." (*See* Hr'g Tr. at 46-47.) Under Justice Stevens's *Shady Grove* concurrence, however, Plaintiffs submit that the context in which a specific statute was enacted is of central importance to determining whether an Enabling Act problem arises. *See, e.g.* 559 U.S. at 419 (Stevens, J., concurring) (applying the Enabling Act test "requires careful interpretation of the state and federal provisions at issue.").

order to displace a federal rule, there must be more than just a possibility that the state rule is different than it appears." *Id*. at 437 (emphasis added).

B. When Construed Against a Backdrop of Prior Supreme Court Precedent, *Racher* Cannot Be Read to Establish an Outcome-Determinative Test for Identifying an Enabling Act Violation.

When read in light of the prior precedent discussed above, it is apparent that the Tenth Circuit was conducting a review of the *Erie* doctrine in the last full paragraph on page 1164, and the paragraph spanning pages 1164-65, of the *Racher* decision, rather than establishing a new test for identifying an *Enabling Act* violation, for at least two reasons. First, any other construction of the *Racher* decision would create internal inconsistencies in the decision itself and would conflict with prior controlling precedent from both the Tenth Circuit and the Supreme Court.[11] And second, the paragraphs at issue exclusively cite prior cases in which the *Erie* doctrine was being applied and there was no federal rule at issue.[12] Thus, the test described in these paragraphs is the

[11] To the extent the Court concludes that the last paragraph on page 1164 and the paragraph spanning pages 1164-65 were intended to establish the test for determining whether a federal rule violates the Enabling Act, then the Court should view the *Racher* decision as being either (1) contrary to prior Supreme Court *and* Tenth Circuit precedent or (2) non-binding dicta. With respect to the former, as England itself has acknowledged in the context of this motion, a later Tenth Circuit appellate panel has no power to overturn a prior panel's decisions. *StorageCraft Tech. Corp. v. Kirby*, 744 F.3d 1183, 1191 n.2 (10th Cir. 2014). Thus, to the extent there is a conflict between *Racher* and prior Tenth Circuit precedent, it is *Racher* that must yield. *See also* n. 17, *infra* at 18. With respect to the latter, the discussion in *Racher* is non-binding dicta because it was not necessary for the court to reach the second prong of *Shady Grove's* analysis in light of its conclusion that there was no direct conflict between Rule 8 and Oklahoma law. *Racher*, 871 F.3d 1152, 1167 (citing *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1218-19 (10th Cir. 2011)) (because there was no conflict between Oklahoma statute and requirements of Federal Rule 8(c), "there was no need to consider validity of federal rule").

[12] The only exception is the court's citation of *Hanna*, which, as explained above, did involve application of a federal rule. *Racher's* citation to *Hanna*, however, was to a portion of that decision discussing application of the *Erie* rule, not the general inapplicability of *Erie* to the federal rules. Thus, it is accurate to say that all of the citations in the paragraphs at issue are to cases conducting an analysis under *Erie*, rather than the Enabling Act.

outcome-determinative test that applies in *Erie* cases, which has been *explicitly rejected* where a federal rule applies by prior controlling case law. *See* Section I.A.2, *supra* at 9-16.

The *Racher* decision itself acknowledges that when a federal rule applies, *Erie* does not. *See* 871 F.3d at 1163 (citing *Shady Grove*, 559 U.S. at 398, 422 and *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1218 (10th Cir. 2011)) ("If there is a direct collision between the state law and the federal rule, the court must next determine whether the federal rule is valid . . . If it is, that rule governs the dispute and there is no need to 'wade into *Erie's* murky waters.'"). Thus, if *Racher* required application of *Guaranty Trust's* outcome-determinative test to determine whether a federal rule violates the Enabling Act, it would be inconsistent with itself and with decades of prior controlling precedent.[13]

Rather than applying an outcome-determinative test, this Court must apply the test described in Justice Stevens's *Shady Grove* concurrence, which, among other things, requires England to come forward with evidence that the Utah Legislature adopted Utah Code § 13-11-20 for the purpose of defining state substantive rights or remedies. As is discussed in the following section, England cannot make this showing.

C. Federal Rule 23 Does Not Violate the Enabling Act When Applied to Plaintiffs' UCSPA Claim in This Federal Class Action.

Under Justice Stevens's *Shady Grove* concurrence, a federal rule does not violate the Enabling Act merely because application of a conflicting state law would lead to a different outcome. Instead, an Enabling Act violation occurs only when application of a federal rule would

[13] The Tenth Circuit has previously applied Justice Stevens's concurring opinion in *James River Ins. Co.*, 658 F.3d at 1218-19, and *Garman v. Campbell County Sch. Dist. No. 1*, 630 F.3d 977, 983-85 (10th Cir. 2010). In neither case did the court apply the outcome-determinative test described in the relevant paragraphs of *Racher*. *See James River Ins. Co.*, 658 F.3d at 1218-19 (no discussion of effect on outcome), and *Garman*, 630 F.3d at 983-85 (same). And as previously set forth, a later Tenth Circuit appellate panel has no power to overturn a prior panel's decisions. *See StorageCraft Tech. Corp.*, 744 F.3d at 1191 n.2. Thus, to the extent there is a conflict between *Racher* and prior Tenth Circuit precedent, it is *Racher* that must yield. *See* n. 15, *supra* at 17.

interfere with a state law that was enacted for the purpose of defining the scope of a substantive right or remedy. Making this determination depends on context, and a state law designed to be procedural "in the ordinary sense" should be treated as procedural unless the party seeking its application demonstrates "more than just a possibility that the state rule is different than it appears." *Shady Grove*, 559 U.S. at 432-36.

While some lower courts have relied on Justice Stevens's concurrence to find Enabling Act violations (in opinions that are not well-analyzed), most federal courts continue to apply a very high "bar for finding an Enabling Act problem." *Id*. at 432.[14]

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[14] In their opposition to England's motion, Plaintiffs cited numerous federal district court cases that reached the opposite conclusion of the one England is urging the Court to adopt here. (*See* Dkt. No. 344 at 28 n.29.) A careful comparison of the cases cited by England, and those cited by Plaintiffs, reveals a stark difference in the level of analysis conducted by such courts. For example, in the cases cited by England, the courts either failed to conduct any analysis at all, instead relying exclusively on the results of decisions made by other district courts, or concluded that a state statute was substantive based merely on where the statute appeared in a state's code, a rationale expressly rejected by the Eleventh Circuit in *Lisk v. Lumber One Wood Preserving, LLC*, 792 F.3d 1331, 1336 (11th Cir. 2015). *See, e.g.*, *Espinosa v. Bluemercury, Inc.*, No. 16-cv-07202-JST, 2017 WL 1079553, at *3 (N.D. Cal. Mar. 22, 2017) (unpublished) (no independent analysis conducted); *Helpling v. Rheem Mfg. Co.*, No. 1:15-cv-2247-WSD, 2016 WL 1222264, at *12-14 (N.D. Ga. Mar. 23, 2016) (unpublished) (no independent analysis conducted); *Fraiser v. Stanley Black & Decker, Inc.*, 109 F. Supp. 3d 498, 505-06 (D. Conn. 2015) (no independent analysis conducted); *Friedman v. Dollar Thrifty Auto. Grp., Inc.*, No. 12-cv-02432-WYD-KMT, 2015 WL 8479746, at *1-5 (D. Colo. Dec. 10, 2015) (unpublished) (statute barring class actions substantive merely because appears in consumer protection statute); *Fejzulai v. Sam's W., Inc.*, No. 6:14-3601-BHH, 2016 WL 4679211, at *5 (D.S.C. Sept. 7, 2016 (unpublished) (state statute prohibiting class actions substantive merely because it appears in "part of the same sentence" that grants a substantive right).

In contrast, in cases concluding that a state law was preempted by a federal rule, courts conducted a much more detailed analysis and rarely depended solely on the outcome of decisions by other federal courts. *See, e.g.*, *In re Hydroxycut Marketing & Sales Practices Litig.*, 299 F.R.D. 648, 654 (S.D. Cal. 2014) (quoting *Shady Grove*, 299 F.R.D. at 408) (Rule 23 preempted state class action bar because "a rule barring class actions does not prevent individuals who would otherwise be members of the class from bringing their own separate suits or joining in a preexisting lawsuit. The substantive rights of these individuals are not affected. The prohibitions against class actions only affect 'how the claims are processed.'"); *Suchanek v. Sturm Foods, Inc.*, 311 F.R.D. 239, 263-64 (S.D. Ill. 2015) (refusing to "employ a sort of herd mentality and mindlessly follow

For example, since the hearing on this matter, the Northern District of Illinois has held that an Illinois statute barring private citizens from bringing indirect purchaser class actions under Illinois's antitrust statute was not applicable in federal court under the reasoning of Justice Stevens's concurrence in *Shady Grove*. *See In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2017 WL 5574376, *29-30 (N.D. Ill. Nov. 20, 2017) (not yet published). Summarizing *Shady Grove*, the court explained that despite the differences between the Justice Stevens and plurality opinions, "at bottom, both the plurality and concurrence were primarily focused on the fact that both Rule 23 and the New York statute governed *when a class action was permissible*, and *this was a procedural, not substantive conflict*." *Id*. at *29 (emphasis added). The court concluded that Rule 23 should apply because, "whether [the] plaintiffs may bring a class action does not affect their substantive rights. The availability of the class action procedure does not change the substantive rights or remedies available to them under Illinois law." *Id*. at *30.

This reasoning applies equally (if not more so) to the opt-in class mechanism with which the Court is grappling here. The lynchpin of the district court's analysis in *Broiler Chicken* was the distinction it drew between whether the rule would change *what* claims and remedies would be available to the plaintiffs (substance) or whether it merely affected *how* those claims could be pursued (procedure). The Northern District of Illinois correctly concluded that the right to bring a class action is a "how" question, not a "what" question, and therefore applied Rule 23.[15] The

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the decisions of other district courts without reexamining the legal issues" and concluding that "Defendants' anemic argument" was insufficient to demonstrate an Enabling Act problem).

[15] The Southern District of California came to the same conclusion. In *In re Hydroxycut Marketing & Sales Practices Litigation*, 299 F.R.D. 648, 654 (S.D. Cal. 2014), the court held that state provisions prohibiting class actions under the consumer protection laws of Georgia, Louisiana, Montana, South Carolina, and Tennessee were inapplicable in federal court to bar class certification under Federal Rule 23. In coming to this conclusion, the court reasoned:

> Whether the state statutory provisions that prohibit class actions for unfair or deceptive practices are "procedural" or "substantive," is a difficult question with

procedural conflict presented here is an even more granular "how" question. Plaintiffs have an undeniable right to pursue their claims as a class, which has already been certified on seven claims under Rule 23 (a decision the Tenth Circuit found was not clearly erroneous). If an opt-in class mechanism were to be imposed on their UCSPA claim (or any other claim), it would have no impact on their substantive rights, as every class member would still have the ability to pursue those claims (and seek the very same remedies) regardless of whether they opted-in. The only thing that would change is the manner in which they would be required to litigate them. In other words, the "what" would remain the same, and only the "how" would change. As both Justice Stevens and the Illinois district court observed, this is the very essence of a procedural rule. Given that Rule 23 does not change or interfere with any state law *substantive* right or remedy, its opt-out class participation procedure governs this class on all claims.

When applying Justice Stevens's analysis to the case at hand, it is revealed just how short England has fallen in attempting to meet its burden. Specifically, England has failed to demonstrate that Utah Code § 13-11-20 defines substantive rights or remedies under Utah law such that application of Rule 23 over § 13-11-20 would constitute a violation of the Enabling Act.

> no clear answer. However, the Court tends to view these limitations on class actions as procedural in nature. In *Shady Grove,* Justice Scalia explained:
>
> > A class action no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of separate suits. And like traditional joinder it leaves the parties' legal rights and duties intact and the rules of decision unchanged.
>
> *Shady Grove,* 559 U.S. at 408, 130 S.Ct. 1431. Conversely, a rule barring class actions *does not prevent individuals* who would otherwise be members of the class *from bringing their own separate suits* or joining in a preexisting lawsuit. The *substantive rights* of these individuals are *not affected*. The prohibitions against class actions only affect "*how the claims are processed*." *Id.* The fact that the class action prohibitions are within the individual state consumer protection acts, as opposed to free-standing rules, does not alter the Court's conclusion.

Id. at 654 (emphasis added).

Section 13-11-20 states, in relevant part:

(1) An action may be maintained as a class action under this act only if:
(a) the class is so numerous that joinder of all members is impracticable;
(b) there are questions of law or fact common to the class;
(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
(d) the representative parties will fairly and adequately protect the interests of the class; and
(e) either:
(i) the prosecution of separate actions by or against individual members of the class would create a risk of:
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
(B) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(ii) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(iii) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

. . . . .

(4) In a class action maintained under Subsection (1)(e) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:
(a) the court will exclude him from the class, unless he requests inclusion, by a specified date;
(b) the judgment, whether favorable or not, will include all members who request inclusion; and
(c) a member who requests inclusion may, if he desires, enter an appearance through his counsel.

Considering the content and structure of the section, it cannot seriously be disputed that § 13-11-20 is "designed as a procedural rule." *See Shady Grove*, 559 U.S. at 432. Indeed, the scant legislative history provided by England demonstrates that at least the original sponsor of § 13-11-20 considered adoption of the opt-in notice provision to be a "change in class action procedure." (*See* Dkt. 373, p. 14 and Dkt. 374, Exs. A & B.) Because § 13-11-20 was "designed as a procedural rule," it must be presumed to be procedural for purposes of the Enabling Act under Justice Stevens's approach. *See Shady Grove*, 559 U.S. at 432 ("T]he bar for finding an Enabling Act problem is a high one. The mere fact that a state law is *designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies*.") (emphasis added).

In light of this presumption, it was incumbent on England to show that the Utah Legislature intended § 13-11-20 to define substantive rights or remedies, despite appearing procedural on its face. Like the defendant in *Shady Grove*, however, England's evidence shows nothing more than that § 13-11-20 was enacted purposefully. If merely showing that § 13-11-20 was "adopted for *some* policy reason" is insufficient to establish an Enabling Act violation, then certainly a mere showing that a statute was enacted intentionally would be insufficient as well. *Id*. at 433-34 ("[I]t is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy. Although almost every rule is adopted for some reason and has some effect on the outcome of litigation, not every state rule 'defines the dimensions of [a] claim itself.'") (emphasis in original).

As with the New York statute at issue in *Shady Grove*, it is plausible to believe that the Utah Legislature adopted § 13-11-20 for reasons that are entirely unrelated to any substantive rights or remedies. Indeed, like the New York Legislature, the Utah Legislature's adoption of § 13-11-20 may simply reveal "a classically procedural calibration of making it easier to litigate [UCSPA] claims in [Utah] courts . . . only when it is necessary to do so, and not making it *too* easy

when the [opt-out] class tool is not required." *See id*. at 435. In other words, the Utah Legislature could have included an opt-in notice provision in section 13-11-20(4)(a) because of a judgment that, given other incentives granted by the statute to plaintiffs bringing individual claims, providing the opportunity to bring an opt-out class action in state court was unnecessary to ensure the efficient resolution of multiple claims. As Justice Stevens indicated, such a judgment would be "classically procedural" in nature and would not justify application of the state statute over Federal Rule 23. In the absence of any evidence to the contrary, nothing more than a "possibility that [§ 13-11-20] is different than it appears" exists. Accordingly, application of Rule 23 over § 13-11-20 does not violate the Enabling Act.

In addition to England's lack of evidence, the plain language of the UCSPA itself supports the conclusion that § 13-11-20 was not intended to define the scope of any substantive rights or remedies. This is perhaps most apparent in Utah Code § 13-11-19(4)(b), which provides:

> If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages *recoverable on behalf of consumers who cannot be located* with due diligence shall be transferred to the state treasurer . . . .

(emphasis added). The only way this statute can be reasonably reconciled with an opt-in requirement is if the opt-in mechanism were interpreted to not limit the scope of unjust enrichment damages that could be recovered from England in a UCSPA "class action." If the opt-in provision of § 13-11-20(4)(a) were construed to limit recovery of damages to only those incurred by individuals who agreed to participate in the case, then there would be no "damages recoverable on behalf of consumers who cannot be located" and nothing to transfer to the state treasurer under § 13-11-19(4)(b). England's contention that § 13-11-20(4)(a) was intended to define the scope of substantive remedies, including damages, would render § 13-11-19(4)(b) completely superfluous,

contrary to well-established rules of statutory interpretation.[16] *See Rajala v. Gardner*, 709 F.3d 1031, 1038 (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)) ("[I]t is a cardinal principle of statutory construction that if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and alterations omitted).

Furthermore, § 13-11-20(4)(a) itself makes any kind of notice (including opt-in notice) optional to begin with. Indeed, § 13-11-20(4)(a) instructs that "the court *may* direct to the members of the class the best notice practicable under the circumstances." (Emphasis added). This permissive language is not accidental. In the commentary to the uniform act upon which the UCSPA is based, the editors explained that "[t]he principal substantive deviation" from the federal approach to class actions was that the Uniform Consumer Sales Practices Act "allows a court

[16] At oral argument, the Court raised the prospect that § 13-11-20(4)(a)'s opt-in provision might be substantive because its application would have a substantial impact on the practical value of this case "both in a settlement posture and also at trial." (*See* Hr'g Tr. at 10:1-11:2.) As an initial matter, and as discussed in more detail above, the *practical* impact that application of opt-in notice might have on the total recovery in this particular case says nothing about the *actual* effect such notice would have on the parties' substantive rights or remedies. Those class members who might fail to opt-in to this action would not be barred from receiving any substantive recovery. (*See id*. at 25:10-26:10.) They would be barred only from such recovery *in this case*. But such individuals would still retain the same substantive claims as those individuals that followed the opt-in procedure. They would merely be required to pursue those claims in a different action. Accordingly, the value of each class member's *individual* substantive claims, and the remedies available under them, are the same whether such claims are pursued as part of an opt-in collective action, opt-out class action, or in an individual action.

Additionally, § 13-11-19(4)(b) undermines any suggestion that requiring opt-in notice in this case will substantially affect the outcome of this litigation. (*See* Hr'g Tr. at 10:1-11:2, 29:11-30:5.) Section 13-11-19(4)(b) implies that, even if only consumers that opt-in to prosecution of this class action are entitled to recover under the statute, England will still be required to pay damages incurred by all consumers impacted by its acts in violation of the UCSPA, including "consumers who cannot be located." Thus, while requiring opt-in notice in this case may limit the number of class members that will ultimately benefit from this action, it does not limit the scope of England's potential liability for damages and will ultimately have little effect on the outcome of the case. Accordingly, even if the Court were to apply *Guaranty Trust's* outcome-determinative test, which Plaintiffs maintain would be reversible error, application of § 13-11-20 would fail that test if the statute is construed, as it must be, in context of the UCSPA as a whole.

discretion with respect to providing class members notice of an opportunity to exclude themselves[17] from class actions based on the existence of common questions of law or fact." *Uniform Consumer Sales Practices Act* § 12, editor's cmt (1970).[18] And Federal Rule 23 uses similar language to provide for discretionary notice in cases certified under Rule 23(b)(1) or (b)(2). Fed. R. Civ. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class.") (emphasis added). This language has been consistently construed to make notice of certification discretionary in cases certified under Rule 23(b)(1) or (b)(2). *See* 3 William B. Rubenstein, *Newberg on Class Actions* § 8:3 (5th ed. 2017).

In contrast, Federal Rule 23(c)(2)(B) directs that, in any class certified under Rule 23(b)(3), "the court *must* direct to class members the best notice that it practicable under the circumstances . . . ." (emphasis added). It would be unreasonable to accept England's contention that the Utah Legislature intended the opt-in notice provision included in § 13-11-20(4)(a) to define the scope of substantive rights and remedies when the plain language of the statute itself does not impose any affirmative obligation on the Court to provide any notice at all.[19]

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[17] Consistent with Rule 23, the Uniform Consumer Sales Practices Act provides for opt-out notice to members of a class maintained under the act. *See Uniform Consumer Sales Practice Act* § 12(d)(1). The Utah Legislature amended the uniform act to provide for opt-in notice but did not change the discretionary nature of that requirement.

[18] For the Court's convenience, relevant excerpts from the Uniform Consumer Sales Practices Act are attached hereto as **Exhibit B**.

[19] While § 13-11-20(4)(a), if applicable, would not require the Court to give any notice at all, the Supreme Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-14 (1985) requires that, in order to meet constitutional due process requirements, at least the opt-out notice required by Federal Rule 23(c)(2)(B) must be given in any class action seeking recovery of damages. This constitutional requirement, which was not clearly established until several years after Utah's enactment of § 13-11-20, does not change the fact that the Utah Legislature determined that opt-in notice should be optional when it adopted § 13-11-20(4)(a).

WRITING SAMPLE OF JASON GREENE - *DANIELS*

Preface: The following pages include an excerpt from an appellate brief I drafted and filed with the Utah Court of Appeals on April 8, 2020 on behalf of Greg and Sharon Daniels. The excerpt was entirely self-edited by myself.

The appeal concerned the foreclosure of the Daniels' home in Kamas, Utah. The Daniels brought the case, seeking to bar the foreclosure of their home and to quiet title against a trust deed that was not enforced within the statutory period required by Utah law. The district court below granted summary judgment in favor of the Daniels, barring the foreclosure, quieting title in the Daniels' favor, and awarding the Daniels' their attorney's fees. The defendants appealed, arguing, among other things, that the district court erred by not recognizing that the statute of limitations with respect to an action on the Daniels' debt was tolled for various reasons. The following excerpt addresses that argument.

The Utah Court of Appeals ultimately affirmed the district court's judgment in full and awarded the Daniels' the additional attorneys' fees they incurred on appeal. *See Daniels v. Deutsche Bank Nat'l Trust Co.*, 2021 UT App 105, 500 P.3d 891.

B. The statute of limitations on Defendants' right to enforce the Debt ran on February 25, 2016, six years after the Daniels' last payment towards the Debt.

1. The trial court correctly applied a six-year statute of limitations.

Although the parties disagree on which specific statute of limitations should be applied in this case, there is no dispute that the limitations period is six-years from the last time the Daniels either (1) made a payment towards the Debt or (2) made a "written acknowledgement of the [D]ebt or a promise to pay." *See* Utah Code §§ 70A-3-118(1), 78B-2-113(1), Utah Code Ann. § 78B-2-309(1)(b) (West 2016) (amended effective May 14, 2019).

Defendants argue that the correct statute of limitations is set forth in Utah Code § 70A-3-118(1), which provides, in relevant part, that "an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." (Defs.' Br. at 18-19.) Because the Debt was accelerated when the 2008 Notice of Default was recorded on September 25, 2008, Defendants argue that the statute of limitations commenced on that date and was thereafter "re-started" by the Daniels' subsequent payments towards the Debt. (*Id*. at 19.)

The Daniels argued below, and continue to maintain, that Section 70A-3-118(1) is not applicable to the Debt at issue in this case because the promissory note signed by the Daniels was not a negotiable instrument as a result of its adjustable interest rate term. (*See* R. 1229-1230.) *See also Doyle v. Trinity Sav. & Loan Ass'n*, 869 F.2d 558, 560 (10th Cir. 1989) (adjustable rate note was not a negotiable instrument for purposes of U.C.C. because it "pegs the interest rate to an external index, so that the amount payable cannot be determined from the instrument itself"); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Alexander*, 728 F. Supp. 192, 200 (S.D.N.Y. 1989) (same); *N. Trust Co. v. E.T. Clancy Exp. Corp.*, 612 F. Supp. 712, 715 (N.D. Ill. 1985) (same).

Thus, the more general six-year statute of limitations applicable to an action to enforce an obligation "founded upon an instrument in writing" would apply in this instance. *See* Utah Code Ann. § 78B-2-309(1)(b) (West 2016) (amended effective May 14, 2019).

Nevertheless, the parties' disagreement regarding which specific statute of limitations should apply is not material because the result of applying either six-year statute would be the same. Utah Code § 78B-2-113(1) provides:

> An action for recovery of a debt may be brought within the applicable statute of limitations from the date:
>
> (a) the debt arose;
>
> (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or
>
> (c) a payment is made on the debt by the debtor.

Because there is no dispute that the Daniels made payments towards the Debt after their initial default and after the Debt was accelerated, the relevant limitations period is six-years following the last event described in Section 78B-2-113(1), whether the specific statute of limitations set forth in Section 70A-3-118(1) or the more general statute of limitations set forth in Section 78B-2-309(1)(b) is applied.

Defendants expressly conceded below that it did not matter whether Section 70A-3-118(1) or Section 78B-2-309(1)(b) applies in this case. (R. 1904-1905, 1920.) Based on that concession, the trial court properly declined to resolve which specific statute of limitations applied, explaining that her "analysis would be the same under either statute." (*See* R. 2013-2014.) (*See also* R. 1463-1464.)

Now, however, Defendants argue that Judge Peterson committed error by not expressly applying the statute of limitations set forth in Section 70A-3-118(1). This argument, however, was

waived when Defendants conceded below that it did not matter which specific statute of limitations applied. *See Carrier v. Pro-Tech Restoration*, 909 P.2d 271, 275 (Utah Ct. App. 1995) (finding argument waived on appeal where party conceded the issue before the trial court).

Moreover, even if Defendants had properly preserved their current argument that Section 70A-3-118(1) should have been analyzed and applied by the trial court, any error by the trial court in failing to do so was harmless as the outcome of the trial court's ruling would have been the same regardless of which specific statute was applied.

2. The statutory limitations period began on February 25, 2010, the date of the Daniels' last payment towards the Debt.

As discussed above, because the Daniels made payments towards the Debt after their initial default and after the Debt was accelerated by the 2008 Notice of Default, the six-year statute of limitations on Defendants' right to commence an action to enforce the Debt began on the date of the last event describe in Section 78B-2-113(1).

There is no dispute that the Daniels' last payment towards the Debt was made on February 25, 2010, when the Daniels made their second trial plan payment before they were notified that their trial plan had been canceled. (R. 119-120, 263.) (*See also* Defs.' Br. at 18-19.) Accordingly, the six-year limitations period began on February 25, 2010 and expired on February 25, 2016, forty-three days before the Daniels filed this action.

3. The Daniels' subsequent communications with Ocwen did not constitute written acknowledgments of the debt.

Defendants argue that, although the Daniels made their last payment towards the Debt on February 25, 2010, the six-year statute of limitations was restarted by the Daniels' subsequent written communications with Ocwen, which Defendants claim constituted written acknowledgement of the Debt for purposes of Utah Code § 78B-2-113(1). (*See* Defs.' Br. at 28-

34.) As Judge Peterson correctly concluded, however, the Daniels' subsequent written communications with Ocwen did not constitute acknowledgments of the Debt, but were instead merely requests for a modification of the Daniels' mortgage that did not restart the statute of limitations. (*See* R. 1464-1465, 2014-2015.)

a. The trial court's conclusion that the Daniels' did not acknowledge the debt after February 25, 2010 is reviewed for abuse of discretion.

The question of whether any of the Daniels' written communications after February 25, 2010 constituted a written acknowledgement of the Debt presents a mixed question of law and fact. Because this determination required the trial court to apply a statute, its interpretation of Section 78B-2-113 is reviewed for correctness. *See Martin v. Kristensen*, 2019 UT App 127, ¶ 26, 450 P.3d 66. As discussed further below, the trial court correctly construed Section 78B-2-113 in accordance with established precedent.

Determining whether the Daniels acknowledged the debt after February 25, 2010, however, also required the trial court to apply the facts to the meaning of "acknowledgement" established by existing case law. Here, there is no dispute between the parties regarding the fact that the Daniels' communicated with Ocwen in writing after February 25, 2010, or about the explicit contents of the Daniels' communications. Thus, Judge Peterson's "application of law to the facts is reviewed for abuse of discretion." *Id*. Under an abuse of discretion standard, a trial court's decision is reversed only if it "was against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice or resulted from bias, prejudice, or malice." *Northgate Village Dev., LC v. City of Orem*, 2019 UT 59, ¶ 27, 450 P.3d 1117 (cleaned up).

As set forth further herein, Judge Peterson's conclusion that the Daniels' post-February 2010 communications with Ocwen did not constitute an acknowledgement of the Debt was not an abuse of discretion.

b. The Daniels' October 2011 letter did not constitute an acknowledgement of the debt.

In opposing the Daniels' motion for summary judgment before the trial court, Defendants argued that a letter sent by the Daniels on October 27, 2011 constituted a written acknowledgement of the Debt that restarted the statute of limitations pursuant to Section 78B-2-113(1). (*See* R. 539-541, 676-677.)

To restart a statute of limitations, a "written acknowledgement" must (a) be made in writing prior to when the statute of limitations expires; (b) be signed by the debtor; and (c) be communicated to the creditor or its agent, or with the intent or purpose of interrupting the bar of the statute, or as relating to any such subject. *See Weir v. Bauer*, 286 P. 936, 945 (Utah 1930). The acknowledgement must be "clear, distinct, direct, unqualified, and intentional." *Wells Fargo Bank, N.A. v. Temple View Investments*, 2003 UT App 441, ¶ 9, 82 P.3d 655. And it must be "*more than a hint, a reference, or a discussion of an old debt*; it must amount to *a clear recognition of the claim and a liability as presently existing*." *Beck v. Dutchman Coalition Mines Co.*, 269 P.2d 867, 869-20 (Utah 1954) (emphasis added). *See also Wells Fargo Bank*, 2003 UT App 441 at ¶ 9 (same).

In *Wells Fargo Bank, N.A. v. Temple View Investments*, this Court held that a letter similar to the one sent by the Daniels in October 2011 was *not* a written acknowledgement of a debt sufficient to restart the applicable statute of limitations. 2003 UT App 441 at ¶ 10. In that case, the defendant defaulted on a promissory note on June 1, 1995. *Id*. at ¶ 4. More than two years later, in August 1997, the defendant's attorney sent a letter to the plaintiff "indicat[ing] a desire to compromise on the matter." *Id*. at ¶ 3. In the letter, the defendant's attorney specifically identified

the promissory note by date and noted the amount that was currently owed. *Id*. at ¶ 8. The plaintiff brought suit in May 2002, arguing that the August 1997 letter constituted an acknowledgement of the debt that restarted the statute of limitations. Despite the contents of the letter, this Court held that the August 1997 letter did not "clearly acknowledge[] any existing liability" and did not contain "a distinct, direct, unqualified, and intentional admission of a present, subsisting debt." *Id*. at ¶ 10 (cleaned up). On that basis, the Court affirmed summary judgment in favor of the defendant. *Id*. at ¶ 11.

Judge Peterson's conclusion that the Daniels' October 2011 letter did not constitute an acknowledgement of the debt for purposes of Section 78B-2-113(1) is in accordance with this Court's holding in *Wells Fargo*. In their brief submitted to the trial court, Defendants pointed to three statements contained in the Daniels' October 2011 letter that they claim made the letter an acknowledgement of the Debt. First, the Daniels' indicated that they were writing to "explain the financial hardship that ha[d] resulted in [their] delinquent mortgage"; second, they stated that the "current mortgage balance (although discharged in bankruptcy) is approximately $335,000"; and third, they stated that they "hope[d] and pray[ed] that this attempt to modify [their] mortgage w[ould] allow [them] to stay in [their] home." (*See* R. 540, 676-677.)

As was the case in *Wells Fargo*, the Daniels' recitation of their understanding of the loan balance is not a "clear, distinct, direct, unqualified, and intentional" acknowledgement of the Debt. Nor does the description of their financial hardship or request for a modification of their mortgage qualify as a "distinct, direct, unqualified, and intentional admission of a present, subsisting debt." Moreover, as Judge Peterson noted in her decision, the Daniels' October 2011 letter explicitly pointed to the Daniels' bankruptcy discharge, demonstrating that they disputed their liability to pay the Debt. (*See* R. 1464-1465, 2014-2015.)

Other parts of the Daniels' October 2011 letter, which are not cited by Defendants, also support Judge Peterson's conclusion that the Daniels were not acknowledging their present liability on the Debt. For example, immediately after reciting the current balance of the Debt, the Daniels predicted that the value of the Property "will appraise for less than $225,000." (R. 677.) This demonstrates that the Daniels believed Defendants would be unable to recover the full balance of the debt through foreclosure and raised this point in an effort to persuade Defendants to compromise by agreeing to a mortgage modification.

Although Utah appellate courts have not yet determined whether a request for a mortgage modification constitutes an acknowledgement of a debt, Judge Peterson's conclusion is consistent with decisions from other jurisdictions. For example, in *Bank of New York Mellon v. Bissessar*, 172 A.D.3d 983, 985 (N.Y. App. Div. 2019), the court held that a letter requesting reconsideration of an application for a loan modification "did not constitute an unconditional and unqualified acknowledgement of the debt sufficient to reset the running of the statute of limitations," but was instead "only a settlement offer that the plaintiff did not accept." And in *Costa v. Deutsche Bank Nat'l Tr. Co. for GSR Mortg. Loan Tr. 2006-OA1*, 247 F. Supp. 3d 329, 351 (S.D.N.Y. 2017), the court similarly held that a debtor's "HAMP applications, including the Hardship Letters, did not revive Defendants' statute-of-limitations period to foreclose on the Mortgage" but were better understood as "a conditional offer of settlement that IndyMac never accepted." *See also 1081 Stanley Ave., LLC v. Bank of New York Mellon Tr. Co., N.A.*, 179 A.D.3d 984 (N.Y. App. Div. 2020); *Sichol v. Crocker*, 177 A.D.2d 842, 842–43 (N.Y. App. Div. 1991); *McQueen v. Bank of New York*, 56 N.Y.S.3d 811, 813–14 (N.Y. Sup. Ct. 2017).

While, as Defendants point out, some jurisdictions have held that applying for a mortgage modification can qualify as an acknowledgement that revives a statute of limitations under certain circumstances, the decisions cited by Defendants are distinguishable from the case at hand.

For example, Defendants cite *Steinberger v. Ocwen Loan Serv., LLC*, Case No. 17-15314, 739 F. App'x 881, 883 (9th Cir. June 28, 2018) (unpublished), which held that, under Arizona law, entering a forbearance agreement and submitting an application for a mortgage modification constituted an acknowledgement that tolled the statute of limitations. But the forbearance agreement at issue in *Steinberger* contained statements that are not found in the Daniels' October 2011 letter, such as an acknowledgement that the creditor had the right to "resume normal collection servicing" upon a breach of the agreement, which the court held was "an implied promise to pay the original debt." *Id*. Moreover, the debtor made payments pursuant to the forebearance agreement. *Id*.

Similarly, the debtor's modification application included an agreement that "all terms and provisions of your current mortgage note and mortgage security instrument remain in full force and effect and you will comply with those terms." *Id*. And the debtor made trial period payments after the modification application was submitted.

The Daniels' October 2011 letter does not contain any statements that are comparable to those cited by the Ninth Circuit in *Steinberger*. (*See* R. 676-677.) And, as discussed above, the Daniels made no payments towards the Debt after February 25, 2010.

Defendants also cite *Wean v. US Bank Nat'l Assoc.*, Case No. C19-1630 MJP, 2019 WL 6498115 at *3 (W.D. Wash. Dec. 3, 2019) (unpublished), in which a federal district court also concluded that a debtor's loan modification applications constituted acknowledgements that restarted a statute of limitations. Unlike in Utah, however, Washington law does not require a

writing to include "a distinct, direct, unqualified, and intentional admission of a present, subsisting debt" to qualify as an acknowledgement. Instead, a "written acknowledgment or promise signed by the debtor that recognizes the debt's existence, is communicated to the creditor, and *does not indicate an intent not to pay*" is all that is needed. *Id*. (emphasis added). Under Washington's more liberal standard, the debtor is presumed to be acknowledging a debt by simply referencing it, unless he or she expressly disclaims any intent to pay. This is not consistent with Utah law. *See Beck*, 269 P.2d at 869-20 (an acknowledgement must be "more than a hint, a reference, or a discussion of an old debt; it must amount to a clear recognition of the claim and a liability as presently existing.").

Finally, recognizing a mere request for a mortgage modification as an acknowledgement of the debt would be ill-advised from a policy perspective. If the Court holds that a homeowner in financial trouble might unwittingly extend the statute of limitations on their creditor's right to enforce a debt by merely asking for a mortgage modification, homeowners will be less likely to seek such modifications, leading to more foreclosures and more financial hardship.

Accordingly, Judge Peterson's determination that the Daniels' October 2011 letter did not constitute a written acknowledgement of the debt that restarted the statute of limitations was not an abuse of discretion.

c. Defendants have not preserved their new argument that other submissions by the Daniels to Ocwen constituted acknowledgements of the Debt.

On appeal, Defendants argue, for the first time, that other written communications from the Daniels to Ocwen also constituted acknowledgements of the Debt that extended the statute of limitations, including (i) the Daniels' bankruptcy schedules, (ii) a Home Affordable Modification Trial Period Plan ("HAMP Trial Plan") entered by Mr. Daniels on February 16, 2010, and (iii) letters dated November 20, 2009; November 20, 2010; April 15, 2011; and April 27, 2011 that

included statements nearly identical to those included in the October 2011 letter. (*See* Defs.' Br. at 29-30.)

Defendants, however, never argued that any of these documents constituted written acknowledgements of the Debt below. (*See* R. 539-540.) As a result, Judge Peterson did not analyze any of these documents when she concluded that the Daniels did not acknowledge the Debt after February 25, 2010. (*See* R. 1464-1465, 2014-2015.)

Indeed, the Daniels' September 25, 2009 bankruptcy schedules were not even part of the trial court record. Instead, Defendants have attempted to supplement the record, without permission, by attaching the schedules as an addendum to their brief to this Court. (*See* Defs. Br. at Add. B.) And although the HAMP Trial Plan and other letters now cited by Defendants were included as attachments to Defendants' various trial court briefs, along with nearly every other document produced in discovery, they were never brought to the attention of the trial court as acknowledgements of the Debt. (*See* R. 555-782, 997-1224 (exhibits consisting of 227 pages of undifferentiated documents produced by Defendants in discovery).)

It is well established that "in order to preserve an issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." *Brookside Mobile Home Park, Ltd. v. Peebles*, 2002 UT 48, ¶ 14, 48 P.3d 968. And this Court has held that it is "under no obligation to scour the record to save an appeal by remedying the deficiencies of an appellant's brief." *Grove Bus. Park LC v. Sealsource Int'l LLC*, 2019 UT App 76, ¶ 43, 443 P.3d 764. Likewise, the trial court should not be required to "scour" undifferentiated documents submitted by a party to identify evidence supporting their position when that evidence is not specifically brought to the court's attention through briefing or argument.

Here, Defendants did not bring anything other than the Daniels' October 2011 letter to the trial court's attention when it argued that the Daniels' had acknowledged the Debt. Accordingly, Defendants have not preserved their new argument that the Daniels made other acknowledgements of the Debt and it, therefore, should not be considered by this Court.

d. Other documents cited by Defendants do not constitute acknowledgements of the Debt.

Even if the Court were to consider Defendants' unpreserved argument that other documents constituted written acknowledgements, however, Judge Peterson's decision should still be affirmed.

First, the Daniels' bankruptcy petition, HAMP Trial Plan, and the November 20, 2009 letter were submitted prior to the Daniels' last payment on February 25, 2010. (*See* Defs.' Br. at Add. B; R. 252-254, 484-486.) Thus, even if they did qualify as acknowledgements, they would not have extended the limitations period because they were submitted before the limitations period began. Moreover, the bankruptcy petition was directed to the bankruptcy court, not Defendants, and therefore did not qualify as an acknowledgement in any event. *See O'Donnell v. Parker*, 160 P. 1192, 1195 (Utah 1916) ("[T]he weight of authority is against the proposition that a mere scheduling of a claim which is barred is a sufficient acknowledgment of an existing liability to authorize the bringing of an independent action thereon."); 4 *Williston on Contracts* § 8:29 (4th ed. 2019) ("[A] schedule of debts made by a debtor who assigns its property for the benefit of creditors or in furtherance of a petition in bankruptcy will not operate to revive the debt so listed . . . .").

Second, the additional letters cited by Defendants do not differ in material ways from the Daniels' October 2011 letter. (*See* Defs.' Br. at 29-30; R. 252-254, 596-597, 666, 1076-1077.) Thus, like the October 2011 letter, these communications do not constitute acknowledgements, but

are instead merely requests for a modification of the Debt that did not restart the statute of limitations.

4. The statute of limitations was not tolled by the Daniels' bankruptcy.

Defendants also argue, for the first time on appeal, that either twenty-six (26) or forty (40) days should be added on to the end of the limitations period at issue as a result of an automatic stay on Defendants' ability to foreclose on the Property triggered by the Daniels' bankruptcy. (*See* Defs.' Br. at 20-21.) Defendants, however, never made this argument to the trial court. Accordingly, the argument has not been preserved for appeal. *See Brookside*, 2002 UT 48 at ¶ 14.

Moreover, even if the argument had been preserved, it would still fail as a matter of law because the automatic stay was never in effect during the limitations period. The Daniels' filed their bankruptcy petition on September 25, 2009, five months before their last payment towards the Debt. (R. 118, 150-152.) Saxon, the servicer of the Debt at the time, successfully obtained relief from the automatic stay less than a month later, on October 21, 2009. (R. 119, 244-246.) Defendants argue that bankruptcy court rules delayed the effect of the order granting Saxon relief from the automatic stay for fourteen days. (*See* Defs. Br. at 21.) The rule in effect at the time the order was entered, however, only stayed the order for ten days. *See* Fed. R. Bankr. P. 4001(a)(3) (West 2009) (amended effective Dec. 1, 2009). Thus, as of October 31, 2009, the automatic stay triggered by the Daniels' bankruptcy was lifted as to Saxon's, and later Defendants', right to foreclose on the Daniels' Property.

Utah Code § 78B-2-112 provides that "[t]he duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitations." Because the automatic stay did not delay the filing of any action by Defendants during the limitations period, which began upon the Daniels' last payment on February 25, 2010, it does

not provide a basis for any tolling under Section 78B-2-112. There is no authority supporting Defendants' novel argument that a bankruptcy stay that is only in effect before a limitations period begins can somehow extend the length of the limitations period.

5. The statute of limitations was not tolled by statutory prohibitions on the trustee's ability to conduct a foreclosure sale.

Defendants also argue, again for the first time on appeal, that the limitations period at issue was tolled by Utah Code § 78B-2-112 as a result of a statutory prohibition on the trustee's ability to conduct a trustee's sale of the Property for three months after the trustee recorded the 2015 Notice of Default on September 29, 2015. (*See* Defs. Br. at 21-22.) As with most of the arguments raised in Defendants' brief to this Court, this argument was never presented to the trial court. Accordingly, the argument has not been preserved for appeal. *See Brookside*, 2002 UT 48 at ¶ 14.

As discussed above, Defendants argue that they *have* preserved their argument by making other tolling arguments to the trial court. Defendants are incorrect for the reasons stated in Section I, *supra* at 24-25.

a. The trial court did not commit plain error by failing to recognize that the statute of limitations was tolled during the three-month period after the 2015 Notice of Default was recorded.

Defendants also argue that, even if this argument was not properly preserved, the Court should still review it because Judge Peterson committed plain error by failing to toll the statute of limitations during the three-month period after the 2015 Notice of Default was recorded, despite the fact that neither the notice of default nor Defendants' argument that it required tolling was ever brought to her attention.

The plain error doctrine is an exception to the rule that issues cannot be raised on appeal unless they are first raised in the trial court. *State v. Bond*, 2015 UT 88, ¶ 36, 361 P.3d 104. To show plain error, an appellant must demonstrate that "(i) an error exists; (ii) the error should have

been obvious to the trial court; and (iii) the error is harmful, i.e., absent the error there is a reasonable likelihood of a more favorable outcome for the appellant." *State v. Dunn*, 2004 UT 63, ¶ 15, 95 P.3d 276. In this instance, there was no plain error because no error exists and because it was not obvious to the trial court that the statute of limitations was tolled during the three-month period after the 2015 Notice of Default was recorded.

i. The statute of limitations was not tolled by the 2015 Notice of Default.

Defendants argument relies on Utah Code § 78B-2-112, which provides that "[t]he duration of an injunction or statutory prohibition which delays the filing of an action may not be counted as part of the statute of limitation," and Utah Code § 57-1-24(2), which provides that "[t]he power of sale conferred upon a trustee . . . may not be exercised until . . . not less than three months has elapsed from the time the trustee [records a notice of default] under Subsection (1)."

Defendants argue that Section 57-1-24 requires tolling of the statute of limitations to bring an action enforcing a debt secured by a trust deed, pursuant to Section 78B-2-112, because it prohibits a trustee from executing a sale under the trust deed for three months following the recording of a notice of default.

Defendants argument, however, is not consistent with the plain language of Section 78B-2-112, which only provides for tolling of a statute of limitations when a statutory prohibition "delays the *filing of an action*." (Emphasis added).

Section 57-1-24, however, does not prohibit the filing of an action to enforce a debt—it only prohibits the execution of a non-judicial trustee's sale. Therefore, it had no impact on Defendants' ability to bring an action to enforce the Debt and therefore could not have tolled the six-year statute of limitations at issue in this case, whether provided by Section 70A-3-118(1) or Section 78B-2-309(1)(b).

Moreover, at least when applied to a non-judicial foreclosure sale, Section 57-1-34 is not a statute of limitations at all. Instead, it is a substantive bar on the legal right of a trustee to exercise the power of sale under any circumstances and renders the power of sale void. *Cf. Victor Plastering, Inc. v. Swanson Bldg. Materials, Inc.*, 2008 UT App 474, ¶ 15, 200 P.3d 657 (statute that rendered lien void where a notice of lis pendens was not timely filed served as a "substantive restriction on the lien action" and "unlike a true statute of limitation, is not waived if not pleaded."). Unlike a statute of limitations, Section 57-1-34 does not merely render the Trust Deed unenforceable—it extinguishes the very power that is granted for the purpose of securing the debt. Thus, Section 78B-2-112 is not applicable to toll the period within which a non-judicial trustee's sale must be complete because Section 78B-2-112, by its plain language, only applies to statutes of limitation.

Furthermore, Utah Code § 57-1-23 provides that "at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property." And Utah Code §§ 78B-6-901 through -909 sets forth the manner in which a mortgage can be foreclosed on through a judicial action. Therefore, if a non-judicial trustee's sale cannot be conducted, because of the prohibition contained in Section 57-1-24(2) or for any other reason, a trust deed beneficiary may initiate a judicial foreclosure by filing an action with the Court. *See Jones v. Johnson*, 761 P.2d 37, 40 n.1, (Utah 1988) ("Utah Code Ann. § 57–1–23 (1986) provides that a trust deed may be foreclosed nonjudicially in accordance with the provisions therein, or by judicial foreclosure, the same as a mortgage."). Thus, even if Section 57-1-34 were considered a statute of limitations, rather than a substantive bar on foreclosure, Defendants could have initiated a judicial foreclosure action at any time during the limitations period without violating Section 78B-2-112. Thus, tolling under Section 78B-2-112 should not be applied.

Finally, evidence that the Utah Legislature did not understand Section 78B-2-112 to toll the statute of limitations during the three-month period following the recording of a notice of default can also be found in the Legislature's 2016 amendment of Section 57-1-34, which now only requires that a notice of default be recorded before the statute of limitations runs on the underlying debt. *See* Non-Judicial Foreclosure Amendments, 2016 Utah Laws 1670, c. 305, § 6 (to be codified at Utah Code § 57-1-34). If, as Defendants argue, the statute of limitations was tolled by the recording of a notice of default, the 2016 amendment of Section 57-1-34 would have served no purpose.

For these reasons, Section 78B-2-112 is inapplicable and does not provide for any tolling of the statute of limitations, or the substantive bar on non-judicial foreclosures, as a result of the recording of the 2015 Notice of Default.

ii. It was not obvious to the trial court that the statute of limitations was tolled by the 2015 Notice of Default.

Even if the statute of limitations was tolled by the 2015 Notice of Default, Judge Peterson's ruling on summary judgment should not be reversed on plain error review because it was not obvious, and should not have been obvious, to Judge Peterson that such tolling should be applied.

"To establish that the error should have been obvious to the trial court, [Defendants] must show that the law governing the error was clear at the time the alleged error was made." *State v. Dean*, 2004 UT 63, ¶ 16, 95 P.3d 276 (citation omitted). "Thus, an error is not obvious if there is no settled appellate law to guide the trial court." *State v. Roman*, 2015 UT App 183, ¶ 9, 356 P.3d 185.

Here, Defendants cite no authority, let alone Utah appellate law, to support their contention that Section 78B-2-112 required tolling as a result of the 2015 Notice of Default. As a result, they have failed to demonstrate that the tolling they now request should have been obvious to Judge

Peterson. Accordingly, they are not entitled to plain error review and the trial court's ruling on summary judgment should be affirmed.

6. The statute of limitations was not tolled by federal regulations against "dual tracking."

Defendants also argue, again for the first time on appeal, that the statute of limitations was tolled pursuant to Section 78B-2-112 as a result of federal regulations prohibiting lenders from pursuing foreclosure while considering an application for a mortgage modification. (*See* Defs.' Br. at 40-42.) More specifically, Defendants argue that 12 C.F.R. § 1024.41(f) prohibited Defendants from foreclosing on the Daniels' home during the limitations period and, therefore, provides for tolling under Section 78B-2-112.

Defendants did not argue that 12 C.F.R. § 1024.41(f) provided a basis for tolling in the trial court. They did, however, make the similar argument that requirements set forth in the Home Affordable Modification Program precluded the initiation of foreclosure proceedings while a HAMP application was under consideration. (*See* R. 1270-1271.) Because this argument was raised for the first time in Defendants' reply in support of their motion for summary judgment, however, Judge Peterson held that the argument was waived. (*See* R. 1466, 2019.)

Rule 7(e)(1) of the Utah Rules of Civil Procedure provides that reply memoranda "must be limited to rebuttal of new matters raised in the memorandum opposing the motion." Accordingly, this Court has repeatedly stated that "[w]here a party first raises an issue in his reply memorandum, it is not properly before the trial court and we will not consider it for the first time on appeal." *Soriano v. Graul*, 2008 UT App 188, ¶ 12, 186 P.3d 960. *See also Stevens v. LaVerkin City*, 2008 UT App 129, ¶ 31, 183 P.3d 1059; *State v. Phathammavong*, 860 P.2d 1001, 1003–04 (Utah Ct. App. 1993) ("It is the responsibility of the moving party to raise in its motion all of the issues on which it believes it is entitled to prevail. *Allowing the moving party to raise new issues in its*

rebuttal materials is improper because the nonmoving party has no opportunity to respond.") (cleaned up, emphasis in *Phathammavong*).

Because Defendants did not raise their argument that the statute of limitations was tolled as a result of HAMP regulations until their reply memorandum, Judge Peterson did not err by holding that the argument had been waived. Therefore, even if Defendants' had asserted in a reply their new argument that the statute of limitations was tolled by 12 C.F.R. § 1024.41(f), the argument should not be considered for the first time in this appeal.

This is especially true here because Defendants' argument is highly fact dependent. It would require a determination of when, and how many times, the Daniels submitted loan modification application(s); when, and how many times, Ocwen sent the Daniels certain notices required by the regulation; the period of time during which the Daniels' modification application(s) were under consideration; and whether Ocwen made a decision on the Daniels' application(s) in a timely manner. The facts that these issues depend on were never developed before the trial court. Indeed, the Daniels had not conducted any discovery regarding the dates that their modification applications were under consideration by Ocwen when Defendants filed their summary judgment motion. Had Defendants raised their argument that federal regulations barred Ocwen from foreclosing while the Daniels' modification requests were under consideration in their summary judgment motion, the Daniels' may have asked the trial court to defer ruling on Defendants' motion to allow more time for discovery, as permitted by Rule 56(d) of the Utah Rules of Civil Procedure. Because Defendants did not raise this argument until this appeal, the Daniels never had a chance to seek such discovery. Therefore, Defendants' new argument should not be resolved for the first time in this appeal. *See Patterson*, 2011 UT 68 at ¶ 15 ("The policy of judicial economy is most directly frustrated when an appellant asserts unpreserved claims that require factual predicates. For

this reason, the preservation rule should be more strictly applied when the asserted new issue or theory depends on controverted factual questions whose relevance thereto was not made to appear at trial.") (cleaned up).

Nevertheless, even if Defendants had properly preserved their argument that the statute of limitations was tolled by 12 C.F.R. § 1024.41(f), the argument would still fail as a matter of law because the regulations at issue were not in effect when the Daniels' modification application(s) were under consideration. On February 14, 2013, the Consumer Financial Protection Bureau published its final mortgage servicing rules for implementation of the Real Estate Settlement Procedures Act (Regulation X), which went into effect for the first time on January 10, 2014. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696 (Jan 10, 2014) (to be codified at 12 C.F.R. pt. 1024). It was through this process that the rule now codified at 12 C.F.R. § 1024.41(f) was first adopted. *See id*. at 10,885. Thus, 12 C.F.R. § 1024.41(f) was not in effect prior to January 10, 2014.

In this case, the Daniels first requested a loan modification from Ocwen in November 2009, more than four years before 12 C.F.R. § 1024.41(f) was adopted. (*See* R. 119, 252-253.) And by at least the end of April 2010, Ocwen had notified the Daniels that their HAMP Trial Plan was cancelled and that the Daniels would not be able to enter a modification agreement. (R. 120.) While the Daniels made further requests to modify the Debt after April 2010, (*see* R. 596-597, 684-685, 666, 676-677), it is unclear from the record whether Ocwen ever considered any of those requests to be completed modification applications (*see, e.g.*, R. 709 (letter from Ocwen dated Nov. 29, 2011 noting purported deficiencies in modification application)). And, in any event, Ocwen informed the Daniels that it would "not delay or stop any collection or legal activity" while it was reviewing the Daniels' applications. (*See* R. 567.) Nevertheless, even assuming arguendo that the

Daniels did submit any additional *completed* applications to modify the Debt, there is no dispute that the Daniels did not make any written requests for modification after October 2011, more than two years before 12 C.F.R. § 1024.41(f) went into effect.

There is no evidence in the record that Ocwen was considering an application to modify the Debt at any time after January 10, 2014. Nor would it have been reasonable for them to do so, given that the Daniels' last written request for modification was submitted more than two years earlier. *See* 12 C.F.R. ¶ 1024.41(c)(1) (requiring a servicer to notify a borrower in writing of his or her loss mitigation options within 30 days of receiving a *complete* loss mitigation application). Accordingly, Defendants were not subject to the requirements of 12 C.F.R. § 1024.41(f) during any portion of the limitations period and it, therefore, does not provide a basis for tolling under Section 78B-2-112.

Applicant Details

First Name	**Valerie**
Last Name	**Gutmann**
Citizenship Status	**U. S. Citizen**
Email Address	**vgutmann@jd23.law.harvard.edu**
Address	**Address** **Street** **6511 High Meadow Court** **City** **Long Grove** **State/Territory** **Illinois** **Zip** **60047** **Country** **United States**
Contact Phone Number	**8479465937**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2017**
JD/LLB From	**Harvard Law School** **https://hls.harvard.edu/dept/ocs/**
Date of JD/LLB	**May 25, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Harvard Negotiation Law Review** **Journal on Legislation**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Mondell, Cathy
cmondell@law.harvard.edu
617-281-0588
del Nido Budish, Sara
sbudish@law.harvard.edu
Saris, Patti
Honorable_Patti_Saris@mad.uscourts.gov

References

Reference #1: Catherine Mondell: cmondell@law.harvard.edu, 617-281-0588

Reference #2: Judge Patti Saris: Honorable_Patti_Saris@mad.uscourts.gov, 617-595-2532

Reference #3: Sara del Nido Budish: sbudish@law.harvard.edu, 617-496-2785

Reference #4: Ariella Guardi: guardia@sec.gov, 202-255-5032

Reference #5: Hope Tone-O'Keefe: HToneOKeefe@jenner.com, 312-840-7286

This applicant has certified that all data entered in this profile and any application documents are true and correct.

VALERIE GUTMANN

6511 High Meadow Court, Long Grove, IL 60047 | valerieraizel@gmail.com | (847) 946-5937

June 27, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, Michigan 48226

Dear Judge Davis:

I am a Class of 2023 graduate from Harvard Law School, and I am writing to apply to clerk for you beginning in August 2024. I miss living in the Midwest after several years away for graduate school and law school. I have enjoyed Detroit each time I have visited and would be pleased to live and work there. I am especially interested in clerking for you because of your focus on public service during your career. You have gained a reputation for actively building community—both in chambers and in Detroit more broadly. While researching you in preparation for this application, I watched the speech that you gave at Kansas City Kansas Public Schools' "2017 Reasons to Believe." I was touched by your recounting of the impact Ms. Cotton and Ms. Young had on you as well as your reminder that leadership is service.

In fall 2023, I will begin my one-year clerkship with Chief Judge Geoffrey W. Crawford of the United States District Court for the District of Vermont. I am looking forward to supporting Judge Crawford and to augmenting the foundational legal research and writing skills that I developed in law school. I am applying to circuit court clerkships to gain additional perspective.

In law school, my journal, student practice organization, and clinic experiences shaped my legal research, writing, and analysis skills. As Co-Editor-in-Chief of the *Harvard Negotiation Law Review*, I was actively involved in selecting and revising the articles that the journal published. As President of the Harvard Mediation Program, I mediated small claims cases and was trained in active listening. Additionally, as a student attorney in the Consumer Protection Clinic, I represented clients in civil litigation hearings, settlement negotiations, and discovery processes. Throughout law school, I prioritized courses that emphasized legal writing. Most recently, in Law and Neuroscience, I wrote a paper evaluating the suitability of various diversion pathways for young adult defendants.

Enclosed, please find my resume, law school transcript, undergraduate transcript, and writing samples. The following individuals have prepared letters of recommendation to accompany my application:

- **Judge Patti Saris**, United States District Court for the District of Massachusetts/Harvard Law School, Honorable_Patti_Saris@mad.uscourts.gov, (617) 595-2532.
- **Sara del Nido Budish,** Harvard Law School, sbudish@law.harvard.edu, (617) 496-2785.
- **Catherine Mondell**, Harvard Law School, cmondell@law.harvard.edu, (617) 281-0588.

If you would find it helpful to speak with my supervisors at my legal internships during summer 2021 and summer 2022, respectively, the following individuals have agreed to be references:

- **Ariella Guardi**, United States Securities and Exchange Commission, Chicago Regional Office, Division of Enforcement, guardia@sec.gov, (202) 255-5032.
- **Hope Tone-O'Keefe**, Jenner & Block LLP, HToneOKeefe@jenner.com, (312) 840-7286.

I would welcome the opportunity to interview with you at any time, either in person or remotely. Thank you for your time and consideration.

Sincerely,

Valerie Gutmann

Valerie Gutmann

VALERIE GUTMANN

6511 High Meadow Court, Long Grove, IL 60047 | valerieraizel@gmail.com | (847) 946-5937

EDUCATION

HARVARD LAW SCHOOL, Juris Doctor**,** May 2023
Honors: Office of Clinical and Pro Bono Programs Award for 1,000+ Hours of Pro Bono Service
Activities: *Harvard Negotiation Law Review*, Co-Editor-in-Chief
Harvard Mediation Program, President
Women's Law Association, Director of Community Development
American Constitution Society

UNIVERSITY OF OXFORD, Master of Science in Comparative Social Policy, September 2020
Honors: 2020 Dahrendorf Scholar (Funded to Study Conceptions of European Identity)
Activities: Oxford Global Leadership Initiative

UNIVERSITY OF CAMBRIDGE, Master of Philosophy in Sociology, July 2019
Honors: 2018 Marshall Scholar (40 Americans Chosen Annually)
Activities: University Women's Water Polo Team; Gonville & Caius College Rowing Team

UNIVERSITY OF CHICAGO, Bachelor of Arts in Sociology, June 2017
Honors: Ignacio Martín-Baró Human Rights Essay Award (For Thesis on Affordable Housing)
Howell Murray Community Service Award (16 Chosen Annually)
Activities: Studied Abroad in Oaxaca, Mexico

EXPERIENCE

U.S. DISTRICT COURT, DISTRICT OF VERMONT, Burlington & Rutland, VT Sept. 2023 – Aug. 2024
Law Clerk to Chief Judge Geoffrey W. Crawford
Will conduct legal research, prepare bench memoranda, and draft opinions.

HARVARD DISPUTE SYSTEMS DESIGN CLINIC, Cambridge, MA, *Student Attorney* Sept. 2022 – Dec. 2022
Worked with the Suffolk County District Attorney's Office to expand their use of Restorative Justice. Authored and presented a final report summarizing key takeaways from 27 stakeholder interviews.

JENNER & BLOCK LLP, Chicago, IL, *Summer Associate* May 2022 – July 2022
Assisted with drafting motions and deposition outlines for a civil rights case and an asylum case. Reviewed and sorted documents into folders based on responsiveness to interrogatories.

HARVARD CONSUMER PROTECTION CLINIC, Boston, MA, *Student Attorney* Jan. 2022 – April 2022
Represented clients in Boston Municipal Court and in settlement negotiations with opposing counsel. Drafted and responded to statements of claims and discovery requests about consumer protection law.

HARVARD NEGOTIATION CLINICAL PROGRAM, Cambridge, MA, *Teaching Fellow* Jan. 2022 & Jan. 2023
Served as a Teaching Fellow for the Negotiation Workshop. Taught 24 students. Led debriefing discussions on simulated exercises and provided feedback on student assignments.

U.S. SECURITIES & EXCHANGE COMMISSION, Chicago, IL, *Legal Intern* May 2021 – July 2021
Researched and wrote first drafts of a motion for partial summary judgment and two motions in limine. Observed testimony and two depositions, including debriefing afterward with my supervising attorney.

CVR ASSOCIATES (Chicago Housing Authority), Chicago, IL, *Reporting Analyst* June 2017 – June 2018
Served as an internal consultant to improve the workflow for housing voucher eligibility interviews.

PERSONAL

Enjoy hiking, traveling internationally, and listening to podcasts. Gold Award Girl Scout.

Harvard Law School

Date of Issue: May 30, 2023
Not valid unless signed and sealed
Page 1 / 2

Record of: Valerie Gutmann
Current Program Status: Graduated
Degree Received: Juris Doctor May 25, 2023
Pro Bono Requirement Complete

JD Program

Fall 2020 Term: September 01 - December 31

1000	Civil Procedure 2 Greiner, D. James	P	4
1001	Contracts 2 Kennedy, Randall	P	4
1006	First Year Legal Research and Writing 2B Salib, Peter	P	2
1003	Legislation and Regulation 2 Davies, Susan	H	4
1004	Property 2 Singer, Joseph	P	4

Fall 2020 Total Credits: 18

Winter 2021 Term: January 01 - January 22

1051	Negotiation Workshop Goldstein, Deborah	CR	3

Winter 2021 Total Credits: 3

Spring 2021 Term: January 25 - May 14

1024	Constitutional Law 2 Feldman, Noah	P	4
1002	Criminal Law 2 Natapoff, Alexandra	P	4
2176	Financial and Legal Needs of Low and Moderate Income Households Charn, Jeanne * Dean's Scholar Prize	H*	2
1006	First Year Legal Research and Writing 2B Salib, Peter	P	2
1005	Torts 2 Sargentich, Lewis	P	4

Spring 2021 Total Credits: 16
Total 2020-2021 Credits: 37

Fall 2021 Term: September 01 - December 03

2348	Advanced Negotiation: Multiparty Negotiation, Group Decision Making, and Teams Viscomi, Rachel	H	4
2048	Corporations Spamann, Holger	P	4
7000W	Independent Writing Budish, Sara	H	1
2455	International Criminal Law Kalpouzos, Ioannis	P	3
2984	Seeing Criminal (In)Justice: Examining the Interplay of Visual Media, Storytelling and Criminal Law Cohen, Rebecca Richman	H	2

Fall 2021 Total Credits: 14

Satisfying the full-time residency requirement at HLS by participating as a Negotiation Workshop TA in Winter 2022

Spring 2022 Term: February 01 - May 13

3073	Access to Justice in the Digital World Plunkett, Leah	CR	1
2376	Dilemmas in Dispute Resolution Budish, Sara	CR	1
2079	Evidence Lvovsky, Anna	P	4
2861	Facts and Lies Saris, Patti	H	2
8035	Predatory Lending and Consumer Protection Clinic Bertling, Roger	H	3
2204	Predatory Lending and Consumer Protection Clinical Seminar Bertling, Roger	H	2
2254	White Collar Criminal Law and Procedure Apps, Antonia	P	2

Spring 2022 Total Credits: 15
Total 2021-2022 Credits: 29

Fall 2022 Term: September 01 - December 31

2194	Dispute Systems Design Clinical Seminar McGaraghan, Neil	H	2
2086	Federal Courts and the Federal System Goldsmith, Jack	P	5
8019	Harvard Dispute Systems Design Clinic Viscomi, Rachel	H	3
2169	Legal Profession: Collaborative Law Hoffman, David	H	3

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Valerie Gutmann

Date of Issue: May 30, 2023
Not valid unless signed and sealed

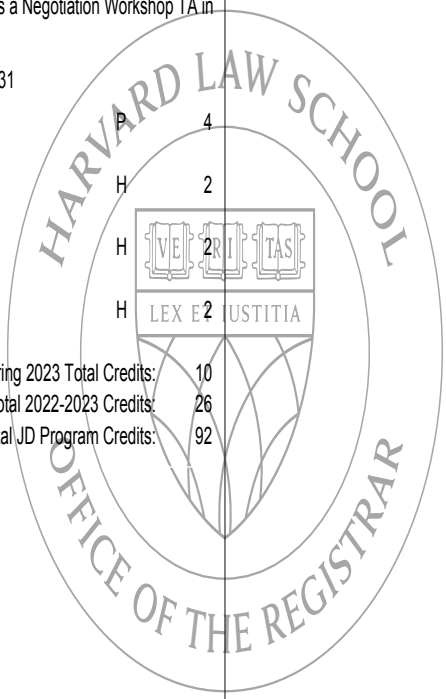
3202	The United States Supreme Court Sunstein, Cass	P	2
3180	When to Talk and When to Fight Heen, Sheila	CR	1
		Fall 2022 Total Credits:	16

Satisfying the full-time residency requirement at HLS by participating as a Negotiation Workshop TA in Winter 2023

Spring 2023 Term: February 01 - May 31

2049	Criminal Procedure: Adjudication Lanni, Adriaan	P	4
2707	Law and Neuroscience Gertner, Nancy	H	2
2654	Restorative and Transformative Justice Lanni, Adriaan	H	2
3213	The Law of Presidential Elections Schwartztol, Larry	H	2
		Spring 2023 Total Credits:	10
		Total 2022-2023 Credits:	26
		Total JD Program Credits:	92

End of official record



Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
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Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

Assistant Dean and Registrar

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing this letter in enthusiastic support of Valerie Gutmann's application for a clerkship with your chambers. Throughout her time at Harvard Law School, Valerie has been an active member of the Harvard Mediation Program ("HMP"), a Student Practice Organization where I serve as the Clinical Instructor and supervising attorney. I have come to know Valerie well through both her work as a mediator and her service as President of the Student Board for HMP. She is an inspiring and effective leader and a wonderful collaborator.

Since joining HMP in 2020 during the fall of her 1L year, Valerie has successfully mediated cases in multiple court sessions and across a variety of case types, and has consistently sought new ways to support the organization, her fellow mediators, and the community we serve. Among other things, she has interviewed prospective mediators, taught as a member of the HMP Training Corps, coached mediators-in-training, and has been actively engaged in events hosted by the organization, from roundtable discussions to speaker events.

I have had the opportunity to interact particularly closely with Valerie over the past year, in which she led the HMP Student Board as President of the organization. In that role, Valerie has worked skillfully with a broad range of constituencies including fellow Student Board members, law school faculty and staff, seasoned mediators serving on HMP's Advisory Board, potential new members, and potential new sources of mediation referrals (including court personnel and community organizations).

A hallmark of Valerie's leadership approach is a welcoming style and genuine curiosity about others' perspectives on the world around them. She has been particularly effective in creating an environment that supports collaboration and consensus-building, drawing on a varied set of tools, from technological solutions to one-on-one outreach and hosting casual coffees and dinners. Notably, where allowing others to flourish has meant taking a less-prominent role for herself, Valerie has been gracious about stepping back and working hard to support the success of her colleagues. Most recently, she has warmly welcomed the addition of a co-President of HMP for the 2022-2023 academic year, and is working to support her new colleague's vision and initiatives.

Valerie's skillful leadership of HMP is all the more impressive because it is only one of many activities to which she has made a deep and sustained commitment. By way of example, she served as a teaching fellow for the intensive 2022 winter-term Negotiation Workshop, and managed to not only balance those obligations with her work for HMP, but to enrich the teaching in each area by encouraging the sharing of pedagogical tools. Valerie's ability to multi-task and boundless enthusiasm are also evident in her leadership role at the Harvard Negotiation Law Review, her participation in reading groups beyond required coursework, her service in multiple clinics and her work with the Women's Law Association. In each instance, Valerie has shown a dedication to growing her own capacities and generosity in sharing her learning with others. She consistently takes the time to understand her colleagues' interests and needs and to connect them to resources, ideas and avenues for further inquiry.

Throughout my interactions with her, I have also found Valerie to be someone who actively seeks feedback and is adept at synthesizing and implementing guidance from others. She has showcased this skill this to excellent effect during meetings of the HMP Advisory Board, a group comprised of professional mediators and dispute resolution practitioners. Though the Advisory Board can be a daunting context for some students, Valerie's ability to listen actively and synthesize guidance has drawn high praise from Advisory Board members in the meetings she had led each of the past two semesters.

On a personal note, Valerie's wide-ranging curiosity has led to many fun and enriching conversations. While law school can become all-consuming for some, Valerie has made it a point to get to know the community around her, to sample broadly from cultural offerings as a regular museum- and theater-goer, and to share generously from her store of information on unique places and experiences in Boston and beyond.

In sum, I recommend Valerie Gutmann wholeheartedly and without reservation. If I can be of any further assistance in your review of her application, please contact me.

Sincerely,

Catherine Mondell, Clinical Instructor
Harvard Mediation Program
Harvard Law School
cmondell@law.harvard.edu

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Valerie Gutmann for a clerkship position. Having worked with Valerie in a number of capacities, I have been impressed by her analytical skills, thoughtfulness towards her peers, intellectual curiosity, and consistent commitment to excellence in all her pursuits. I am certain that she would do an outstanding job as a law clerk.

I first met Valerie when she was a student in a course that I co-taught in fall 2021, "Advanced Negotiation: Multiparty Negotiation, Decision Making, and Teams." This challenging workshop-style course involved negotiation simulations, written journal entries, and a multi-week intensive group project focused on a real-world negotiation challenge. Valerie was an actively engaged participant, keenly observing the dynamics that came up in class and applying the theoretical concepts from the readings in order to identify possible interventions (she articulated this analysis clearly and reflectively in her assigned journal entries). This bridging of theory with practice is exactly what my co-instructor and I hoped that students would take from the course. Her level of preparation was evident in the in-class exercises, but I also got a window into her thought process through her multiple visits to my office hours over the course of the semester, during which she approached me with organized, thoughtful questions about the class material and how it might apply to her life as a student more broadly. She subsequently enrolled in a reading group I taught in spring 2022, "Dilemmas in Dispute Resolution," which explored the moral and ethical challenges inherent in the field of dispute resolution. In this discussion-based course, I was always excited when Valerie raised her hand, as I knew she would contribute a surprising and cogent question, a thoughtful comment that would shift the conversation in a new direction, or a facilitative prompt to encourage her peers to weigh in. As another example of her ability to hold challenging theoretical concepts alongside lived experience, Valerie frequently brought into class discussions her own experience as a mediator in small claims court, attempting to square what she had seen with the more abstract ideas in the readings. Valerie seems to be constantly thinking about what concepts and rules look like when they are brought to life, as well as what beliefs, assumptions, or norms lay underneath actions and behaviors. It is a quality that has served her well in our courses, and will also greatly benefit her as a law clerk.

I also had the opportunity in fall 2021 to get to know Valerie as a writer, as she was serving during that semester as a student blogger for the Harvard Negotiation and Mediation Clinical Program blog. Her primary essay focused on her peers' experiences of negotiating boundaries with roommates during the 2020-2021 academic year (during which Harvard Law School was operating virtually). In addition to the timely and fascinating topic, what stood out to me most through this engagement was Valerie's openness to—and, indeed, solicitation of—feedback. Her writing was already strong, with a clear and almost journalistic voice, and she always welcomed suggestions (no matter how granular—we frequently spent time trying to find exactly the right word for a dynamic, or landing on the perfect title for a section). This eager engagement in the back-and-forth of deep work on a written piece made Valerie a pleasure to work with.

Her inclination towards a culture of feedback is only one of the many leadership and interpersonal skills that Valerie has brought to each role in which I have been fortunate to know her. No one can work with Valerie without noticing her inherent drive, and tendency towards organization and action. She is hugely skillful in designing processes and creating structure for open-ended projects (as I particularly observed in the intensive group project in the Multiparty Negotiation course); this expertise alone makes her a reliable and valuable teammate. What I find particularly special about Valerie, though, is that she simultaneously seeks opportunities to include others in everything she does. As President of the Harvard Mediation Program, in her authorship for the blog, and even in course simulations in which she was empowered as the sole decisionmaker, Valerie has used her considerable skills and, I believe, a genuine and deep-seated belief in the value of different perspectives to actively engage with others and give them a meaningful voice. She has outstanding listening skills, checking her own understanding as well as asking what often feels like the perfect follow-up question to help her peers or, indeed, her instructors to reflect more deeply. She values consensus-building, and manages to put the spotlight on the group, rather than herself, even when she is facilitating. At the same time, she is unafraid to share her own perspective, and is skillful in her choice of moments in which to move into advocacy mode. I believe that it is increasingly important for all lawyers to possess the kind of critical thinking and communication skills that Valerie has cultivated, and these skills will surely benefit not only her, but also the groups with whom she works in the future.

In having Valerie as a clerk, I strongly believe that you will have a respectful and curious intellectual thought partner who takes a thorough, passionate, and justice-oriented approach to all cases that come before you. I recommend her enthusiastically, and would be happy to answer any additional questions you may have.

Best wishes,

Sara del Nido Budish
Lecturer on Law, Harvard Law School
Assistant Director, Harvard Negotiation & Mediation Clinical Program

June 27, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to highly recommend Valerie Gutmann for a clerkship. She received an honors in the class I gave at Harvard Law School.

As mentioned, Valerie was a student in my seminar, Facts and Lies, spring 2022 at Harvard Law School. We met twelve times in a small group, and Valerie also spoke with me several times in office hours. The course focused primarily on the role of the trial court in finding facts, the tools used to assess credibility, problems with memory and implicit bias, and the doctrines which punish lying. We also addressed appellate review of agency factfinding and the standards of appellate review of factual questions, in particular in constitutional areas and mixed questions of fact and law. We talked about the role of the "managerial" trial judge.

I required extensive writing. Each student drafted a memorandum in support of a motion to dismiss, in opposition, and a memorandum on a summary judgment motion. Students also submitted response papers to the readings. Valerie's written product was consistently high quality. Her final memorandum was well written. She drafted a memorandum on a summary judgment in a civil rights action involving the qualified immunity doctrine. Her factual narrative was excellent; she used the factual record well. Her response papers analyzing the legal readings were thorough and sometimes outstanding.

Valerie was an active participant in class discussions and had interesting things to say about the readings. She has an enthusiastic personality. I have no reservations about recommending Valerie. Please call if there are any questions.

Very truly yours,

Patti B. Saris
U.S. District Judge

Patti Saris - Honorable_Patti_Saris@mad.uscourts.gov

This writing sample is an assignment that I wrote at the end of March 2022 for my Facts and Lies class with Judge Patti Saris. The assignment is based on a case that Judge Saris had before her several years ago, and the reading for this assignment was the entirety of the record from the real-life case. The assignment operated in a closed universe of case law that was provided to us. We were asked to write no more than 10 double spaced pages and were instructed to discuss the Failure to Train claim only briefly (because of the length restrictions). This writing sample is my own work. I made a few minor wording changes in response to feedback from Judge Saris when she graded the assignment. If you would like the version of the assignment that I originally submitted to Judge Saris, I am happy to send it to you.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JUDITH GRAY, Plaintiff, v. THOMAS A. CUMMINGS AND TOWN OF ATHOL, Defendants.	)	Civ. No. [redacted]

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This is a case about a police officer approaching a woman with one key piece of information about her: that she was experiencing an acute mental health crisis (Plaintiff's Complaint ¶ 15-18). Within moments of approaching Ms. Judith Gray ("Ms. Gray"), Officer Thomas Cummings ("Officer Cummings") tased her in the back and handcuffed her while still pulling the trigger of the taser (*Id.* at ¶ 23).

Unlike the kinds of split-second decisions that are regularly made by police officers who are unclear whether they are witnessing a mental health crisis or another type of crisis (such as a drug overdose), this was a situation where a police officer had clear warning about Ms. Gray's mental health and still acted with excessive force in a way that (1) violated Ms. Gray's clearly

established Fourth Amendment rights and (2) reveals the Town of Athol's failure to train its police officers to respond appropriately to civilians experiencing mental health crises.

Plaintiff has introduced evidence to demonstrate that Officer Cummings' use of force was not objectively reasonable and the training on mental health was deficient. There are disputed questions of fact on both claims. The court should deny the motion for summary judgment.

STATEMENT OF FACTS

Ms. Gray has an established history of bipolar disorder, and reports of her manic episodes have previously led to interactions between members of the Town of Athol Police Department and Ms. Gray, including two calls that Officer Cummings himself received "while employed as a dispatcher" (Plaintiff's Complaint ¶ 6-8; Responses of the Plaintiff to the Statement of Undisputed Material Facts at ¶ 1C). The Town of Athol was thus aware that there were residents of Athol who had serious mental health concerns that were likely to lead to interaction with the town's police officers.

On May 2, 2013, Ms. Gray called the police in response to a domestic dispute happening between her daughter and her daughter's boyfriend (Plaintiff's Complaint at ¶ 9). Ms. Gray's daughter asked for support from an ambulance, but police officers were sent instead (*Id.*). Upon arriving at Ms. Gray's home, the police officers drove Ms. Gray to the hospital in the back of a police car, where she remained for several hours before leaving "[because she was] terrified" (*Id.* at ¶ 11, 13; Deposition of Judith Gray at 36). The Athol Memorial Hospital informed the Athol Police Department that Ms. Gray was an involuntary commitment patient, described her clothing and the fact that she was not wearing any shoes, and requested assistance returning Ms. Gray to the hospital for continued psychiatric care (Plaintiff's Complaint at ¶ 14).

Shortly after receiving this description, Officer Cummings saw Ms. Gray on the street and approached her (*Id.* at ¶ 19-20). When Ms. Gray stated that she was not going back to the

hospital, Officer Cummings grabbed Ms. Gray by her shirt and pushed her to the ground (*Id.* at ¶ 21-22). Officer Cummings contends that he did this "because he thought that [Ms. Gray] was going to try and harm him" even though Ms. Gray was five inches shorter and approximately 75 pounds lighter than Office Cummings; this is a genuine dispute of material fact (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 24; Responses of the Plaintiff to the Statement of Undisputed Material Facts at ¶ 5A-B). Once Ms. Gray was on the ground, Officer Cummings tased her in the middle of her back and—while still tasing her[1]— handcuffed Ms. Gray (Plaintiff's Complaint at ¶ 22). It was at this point that an additional police officer arrived on the scene, after which Officer Cummings called for an ambulance to transport Ms. Gray to the hospital; medical transport services had not been called up until that point (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 43).

Officer Cummings submitted an application for a criminal complaint against Ms. Gray (*Id.* at ¶ 49). These charges were later dismissed, but their existence caused Ms. Gray to be suspended from work because they appeared on a routine background check conducted by her employer (Deposition of Judith Gray at 69).

Throughout the events described above, Ms. Gray experienced emotional distress and physical injuries—both of which persist to this day (*Id.* at 67-8).

[1] By contrast, Officer Cummings contends that it was only after holstering his taser that he handcuffed Ms. Gray (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 39). In a motion for summary judgment, the facts are construed in the light most favorable to the non-moving party. Nonetheless, Officer Cummings's assertion about the order of events represents a genuine issue of material fact that should be heard before a jury if it survives a hearsay challenge (given that the Police Report is unsworn testimony that constitutes an out of court statement offered for the truth of the matter asserted and, Plaintiff contends, does not fall within any of the established hearsay exceptions).

STANDARD OF REVIEW

Summary judgment is properly granted only if there is "no genuine issue as to any material fact and… the moving party is entitled to judgment as a matter of law" (*Celotex Corp. v. Catrett*, 477 U.S. 317, 317). Here, genuine disputes of material facts persist and should be preserved to be heard by a jury.

LEGAL ARGUMENT

I. Officer Cummings is not entitled to qualified immunity. In the alternative, his entitlement to qualified immunity rests on genuine disputes of material fact that should come before a jury.

A. Officer Cummings violated the Fourth Amendment in arresting Ms. Gray because he used excessive force.

In *Graham v. Connor*, 490 U.S. 386, 399 (1989) the Supreme Court established that Fourth Amendment claims give rise to a reasonableness inquiry that is specific to the facts and circumstances of the case. *Graham* also identified three factors to consider when contemplating claims of excessive force: severity of the underlying crime, potential danger to those involved, and attempt by the suspect to actively resist arrest. If it is found that excessive force was used, then the civilian's Fourth Amendment rights were violated.

With respect to the first *Graham* factor, Ms. Gray had not committed any underlying crime when Officer Cummings approached her. Officer Cummings later accused Ms. Gray of four criminal charges, but these were dismissed (Plaintiff's Complaint ¶ 30-31). The only reason Officer Cummings approached Ms. Gray was because he recognized her clothing and lack of footwear as meeting the description of a person the Athol Memorial Hospital had contacted the Town of Athol Police Department about for a Section 12 involuntary hospitalization (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 7). As expert witness Michael Lyman clarifies, a Section 12 call is "not a criminal call" (Deposition of Michael Lyman at 23).

With respect to the second *Graham* factor, this is a key area where there are disputes of material facts. Officer Cummings asserts that he "thought [Ms. Gray] was going to try and harm him" when he approached her on foot and attempted to handcuff her (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 24). Officer Cummings also claims that he could not "make [the] determination" of whether he was a "much stronger person than Judith Gray" (Deposition of Thomas Cummings at 48). By contrast, Plaintiff contends that Ms. Gray "was not an immediate danger to anyone," in part because she five inches shorter and approximately 75 pounds lighter than Officer Cummings (Responses of the Plaintiff to the Statement of Undisputed Material Facts at ¶ 5A-B).

Another consideration within this prong is whether Ms. Gray was a danger to the community. Defendants repeatedly emphasize Ms. Gray's purported profanity toward Officer Cummings (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 10, 12, 18, 22, 29). One might conclude that Defendants are suggesting that this profanity is representative of aggression and therefore potential danger to the community. Even if a reasonable juror could infer that unprovoked swearing at others and imminent violence toward others are inextricably linked, this inference relies on the assumption that Ms. Gray began swearing at Officer Cummings without cause. This is a genuine dispute of material fact. Defendants claim that Ms. Gray "yelled [profanity] at Officer Cummings immediately after he got out of the car" (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 10). Plaintiff contends that beginning the interaction with Ms. Gray by immediately getting out of the car and pursuing her on foot was itself "unreasonably escalative" (Expert Report of Michael D. Lyman on December 23, 2015, at 8) and therefore could be seen as a form of provocation.

Further profanity from Ms. Gray toward Officer Cummings could be attributed to the fact that Officer Cummings asserts that the very first thing he said to Ms. Gray was that she "needed to go back to the hospital" that she had just fled because she felt "terrified" there (Defendants' Statement of Undisputed Material Facts in Support of their Motion for Summary Judgment ¶ 11; Deposition of Judith Gray at 36). Defendants further assert that Ms. Gray "[yelled] obscenities at people as they drove by with their car windows down," but this is a genuine dispute of material fact that Ms. Gray squarely denies (Responses of the Plaintiff to the Statement of Undisputed Material Facts at ¶ 44).

With respect to the third *Graham* factor, Ms. Gray's profanity toward Officer Cummings was not akin to actively resisting arrest. The 1st Circuit has found that "a reasonable officer would not discharge his taser simply because of insolence" (*Parker v. Gerrish*, 547 F.3d 1, 10, in which the 1st Circuit determined that a police officer used excessive force when firing his taser during a DUI arrest of a man who swore at one of the arresting officers). It is true that Ms. Gray was refusing to voluntarily return to the Athol Memorial Hospital. However, since Ms. Gray committed no underlying crime and was not verbally told by Officer Cummings that she was under arrest, her resistance to traveling with Officer Cummings back to the hospital does not meet the threshold required by the third *Graham* factor.[2]

B. Ms. Gray's Fourth Amendment right was clearly established at the time of the arrest.

With respect to qualified immunity, in *Mullenix v. Luna* the Supreme Court found that officials are shielded by qualified immunity unless their conduct "[violates] clearly established

[2] Ms. Gray asserts that she was told to get down on her knees, which she is not able to do "because of previous injuries" (Deposition of Judith Gray at 39). It is unclear from the record whether Officer Cummings agrees with Ms. Gray's memory of being told to get down on her knees, but if Officer Cummings did instruct her to do so and Ms. Gray did not immediately comply, her previous knee injury is relevant context.

statutory or constitutional rights of which a reasonable person would have known" when analyzing the "specific context of the case, not as a broad general proposition" (*Mullenix v. Luna*, 577 U.S. 7, 11-2). This has been further defined by *Ciolino v. Gikas*, where the 1st Circuit held that qualified immunity cases call for a two-step inquiry in which the court must ask "(1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right; and (2) if so, whether the right was 'clearly established' at the time of the defendant's alleged violation" (*Ciolino v. Gikas,* 861 F.3d 296, 303). Here, both prongs have either been met or rest on disputes of material fact that would be improperly resolved by a grant of summary judgment.

In order to determine whether a constitutional right is clearly established, the court must ask "(a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right" (*Gikas* at 303).

The first inquiry is straightforward: freedom from "excessive force by an arresting officer" is a clearly established right in the 1st Circuit (*See Id.*, in which the court conducted their analysis of this first in just three sentences in a case involving a police officer suddenly and violently taking a man to the ground in a way that caused injury).

With respect to the second inquiry, the 1st Circuit has previously found that reasonable police officers begin their interactions with civilians in situations that are not urgently time-sensitive by using minimally aggressive techniques (*See Gikas,* finding that an arresting police officer could not be granted qualified immunity in large part because he confronted a man outside of a nightclub and took rapid physical action to bring him to the ground despite the fact that the atmosphere did not require split-second decision-making; *See also Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 346 (1st Cir. 1995), holding that a police

officer's actions dragging a woman—who was at that time calmly eating dinner in circumstances that were not rapidly changing—out of a McDonald's restaurant were not objectively reasonable). Here, Officer Cummings began the interaction with Ms. Gray by exiting the vehicle and approaching her, instead of asking her how she was or attempting to calm her down while remaining inside his vehicle (Responses of the Plaintiff to the Statement of Undisputed Material Facts at ¶ 20A). The situation was also not time-sensitive, as Ms. Gray was only a few blocks away from the hospital and was not walking "terribly fast" (Deposition of Thomas Cummings at 30).

The caselaw is clearly established that the use of force should be measured against the severity of the crime. In *Morelli v. Webster*, 552 F.3d 12, 25 (1st Cir. 2009), the 1st Circuit declined to grant a police officer qualified immunity when he physically injured an exotic dancer who was suspected of petty theft—because of the minor nature of the dancer's crime and the presence of serious injury to the dancer. Because Ms. Gray had committed no crime and was suffering from severe mental illness when she was approached by Officer Cummings, the police officer had clear notice that the use of a taser was excessive force in violation of the Fourth Amendment.

At the time of Ms. Gray's arrest, Officer Cummings had notice in the form of existing binding caselaw in the 1st Circuit that his actions in the circumstances that surrounded Ms. Gray's arrest were a violation of her Fourth Amendment right to be free from excessive force from an arresting officer. He is therefore not entitled to the protection afforded by qualified immunity doctrine.

II. The Town of Athol is liable to Ms. Gray because of their failure to train police officers in how to respond appropriately to community members experiencing mental health crises. In the alternative, the question of the Town of Athol's municipal liability rests on genuine disputes of material fact that should come before a jury.

Officer Cummings, in his deposition on August 17, 2015, claimed that he understood the Section 12 classification from the hospital to say only that the person in question was "a danger to either themselves or others" and that he did not specifically understand this classification to mean that Ms. Gray was experiencing a mental health crisis (page 22). To the extent that this is true, it represents a failure to train by the Town of Athol Police Department.

In order to prevail on a theory of municipal liability, a plaintiff must establish a constitutional deprivation and then (1) show that "the municipality had a custom, policy, or practice of failing to investigate, discipline, supervise, or train its officers; (2) this custom, policy, or practice was such that it demonstrated a 'deliberate indifference' to the rights of those citizens with whom its officers came into direct conduct; and (3) the custom, policy, or practice was the direct cause of the alleged constitutional violation" (*Smith v. City of Holyoke* (D. Mass. 2020) at R.14, relying on *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978)).

In this case, the Town of Athol Police Department had previously interacted with Ms. Gray while she was experiencing manic episodes, putting them on notice that their police officers were likely to interact with civilians experiencing acute mental health crises (Plaintiff's Complaint ¶ 7-8). Despite this, the Town of Athol provided Officer Cummings with insufficient training on Section 12 involuntary hospitalizations that was deliberately indifferent in scope or impact to the likelihood that its officers would have to respond to civilians in the midst of a mental health crisis (Deposition of Thomas Cummings at 22, claiming that he did not recall during his interaction with Ms. Gray that Section 12 cases are explicitly about responding to mental health crises).

Additionally, the expert report of Michael Lyman concludes that "[Officer Cummings] was not properly trained in dealing with the mentally ill or de-escalation techniques," as evident by the fact that a properly trained police officer in Officer Cummings's circumstances would "not have followed [Ms.] Gray on foot" and would have utilized "soft hand control" techniques instead of firing his taser (Expert Report of Michael D. Lyman at 15, 14). The Town of Athol also failed to provide Officer Cummings with training that would have led him to wait for backup and the ambulance before attempting to physically restrain Ms. Gray—an action which led to the deprivation of Ms. Gray's constitutional rights under the Fourth amendment.

CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court deny Defendants' motion for summary judgment.

By Plaintiff's attorney,

/s/ Valerie Gutmann
Valerie Gutmann, S.J.C. Rule 3:03 Student Attorney
Harvard Law School
1557 Massachusetts Avenue, Room 200
Cambridge, MA 02138
(847) 946-5937
vgutmann@jd23.law.harvard.edu

PROOF OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment was served by email on March 30, 2022 on Thomas R. Donohue of Brody, Hardoon, Perkins & Kesten, LLP (tdonohue@bhpklaw.com).

/s/ Valerie Gutmann
Valerie Gutmann

This writing sample is an assignment that I wrote in May 2023 for my Law and Neuroscience class with Judge Nancy Gertner. Judge Gertner asked students to write a research paper about any topic related to the course. I proposed the topic of emerging adults and alternative dispute resolution to Judge Gertner and received a brief confirmation that it was acceptable, but we did not discuss the paper in any further depth either before or after I submitted it. This writing sample is my own work. It uses Harvard format citations and incorporates excerpts from qualitative interviews that I conducted. In an endeavor to be respectful of your time, I have excluded the appendix (the transcripts of the interviews). If you would like the full version of the paper, I am happy to send it to you.

Juveniles and Emerging Adults are Well-Suited to Alternative Dispute Resolution— Both Despite and Because of Their Ongoing Brain Development

Valerie Gutmann

Harvard Law School
Law and Neuroscience
May 5, 2023

Instructors
Judge Nancy Gertner, JD, MA
Dr. Robert Kinscherff JD, MD
Dr. Judith Edersheim, JD, MD

Table of Contents

I. Abstract

In recent decades, there has been a newfound understanding in neuroscience research that human brains are still developing until age 25.[1] This understanding has led young adults aged 18-24 to be referred to as "emerging adults," and recognition of the ways that emerging adults are meaningfully distinct from adults aged 25 and older is particularly salient in the context of the criminal legal system. The criminal legal system in the United States has undergone its own transformation over the last few decades[2] as society has grappled with how to address mass incarceration, leading to the increased use of Alternative Dispute Resolution (ADR).[3] In this paper, I explore the distinctions between different ADR processes as well as how these processes are important for lawyers to understand. I also explore how they are structurally situated alongside the court system, including tribal courts in Native American communities. I then draw comparative insights from New Zealand, the United Kingdom, and South Africa. Through my analysis of a combination of semi-structured qualitative interviews conducted for this paper with academics in the field of ADR and existing academic literature, I ultimately argue that juveniles and emerging adults are well-suited to Alternative Dispute Resolution—both despite and because of their ongoing brain development.

[1] In a broader sense, human brains continue to "develop" throughout the course of one's life, at least according to Lebel and Beaulieu in their 2011 article "Longitudinal Development of Human Brain Writing Continues from Childhood into Adulthood" in the Journal of Neuroscience. However, this depends on the operative definition of "develop." In the Abstract above, I use "develop" to refer to the period of particularly acute growth that takes place as humans develop an understanding of themselves and the world around them in childhood, adolescence, and young adulthood—not the colloquial sense of the word "develop," which is much more similar to growth and change in response to stimuli.

[2] While these conversations, and the accompanying advocacy and lobby efforts, have been going on for decades, it was not until 2009 to 2010 that "for the first time in 30 years, the number of people behind bars [in the United States] dropped, albeit slightly" (Vogel, 2012).

[3] Alexander, M., 2020. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. The New Press.

II. Introduction

This paper sits at the nexus of my interests in Alternative Dispute Resolution (ADR), sociology, and neuroscience. It explores the options that are, or soon may be, available to juvenile and emerging adult defendants in the United States at a time when the criminal legal system is reconsidering the norm of punitive justice that led to decades of over incarceration. A variety of different Alternative Dispute Resolution processes are currently in the process of being established, expanded, and evaluated across the country.[4] In this paper, I argue that juveniles and emerging adults up to age 25 are broadly well-suited to ADR even—and perhaps especially—when taking their ongoing brain development into account.

The next section in this paper, Section III, is a discussion of my methodology. I am a strong believer in the importance of transparency when it comes to academic methodology. Using my graduate school training in sociology from before law school, I conducted a series of six semi-structured qualitative interviews with Alternative Dispute Resolution academics at four universities. I conducted the interviews over Zoom and recorded them with the interviewees' permission. I then transcribed the interviews and qualitatively coded them to identify the six subsections of Section VI, the Argument and Analysis section of the paper. I paired the insights from the qualitative interviews with analysis of existing academic literature, including the articles that we were assigned as reading for our Law and Neuroscience class.

In Section IV, I summarize the neuroscience research that forms the foundation of the claim that both juveniles (under the age of 18) and emerging adults (up to age 25) are in a period of their life where their brains are still rapidly developing. I also discuss the technological advancements in brain imaging that made this research possible.

[4] Goldberg, S.B., Sander, F.E., Rogers, N.H. and Cole, S.R., 2020. *Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes*. Aspen Publishing.

In Section V, I explain the historical context that led the field of Alternative Dispute Resolution to where it is now. I also define a variety of different dispute resolution methods that fall under the umbrella of Alternative Dispute Resolution. This leads to a discussion of how challenging it is for ADR professionals to collaborate and learn from each other when the same ADR terms can mean dramatically different things depending on the geographic jurisdiction and court or non-court context in which the process takes place. I conclude the section with a discussion about the obstacles to effective impact measurement within tribal and non-tribal settings where Alternative Dispute Resolution processes are being used.

In Section VI, I present the argument and analysis that underlies my claim that juveniles and emerging adults are well-suited to Alternative Dispute Resolution. I begin the first subsection with a discussion of the suitability of different types of Alternative Dispute Resolution for juveniles and emerging adults. In the second subsection, I then discuss juvenile and emerging adult defendants in the context of Native American communities, including an analysis of the role of tribal courts and healing to wellness courts. Next, in the third subsection, I argue that it is important for lawyers to understand the different ADR options, including the complexity and emerging reality of Online Dispute Resolution. In the fourth subsection, I highlight from a structural perspective what it means when ADR options are operated within (or closely adjacent to) the court system. In the fifth and penultimate subsection, I present comparative case studies that offer international insight into what ADR could look like in the United States in the future.

In Section VII, I conclude by reiterating my core argument about juveniles and emerging adults being well-suited to Alternative Dispute Resolution processes, calling attention to several feasibility concerns associated with the expanded use of ADR for emerging adult defendants, and

stepping slightly outside of the focus on juvenile and emerging adult defendants to argue that ADR processes should be more broadly available to adults above the age of 25 too.

Finally, Section VIII is a list of all of the sources I cite throughout the paper, and Section IX is an appendix that includes the transcripts of the six qualitative interviews I conducted while researching this paper.

III. Methodology

I first considered writing about juveniles and emerging adults at the beginning of the semester, and I was grateful for Judge Gertner's approval to pursue this topic further and consider ways that it overlapped with my other areas of academic interest. Next, I reviewed the readings and my in-class notes on the guest lectures from the weeks in Law and Neuroscience when we discussed emerging adults up to age 25. I also began discussing an Alternative Dispute Resolution focus with Dr. Kinscherff, which led me to focus on the question of whether juveniles and emerging adults are well-suited to ADR processes.

I worked to build my understanding of the academic literature in this field by reading academic articles on neuroscience, sociology, and Alternative Dispute Resolution. Many of these articles are quoted in the paper.

In order to gain more insight into the ADR part of the research question, I decided to conduct semi-structured qualitative interviews with ADR academics whose perspectives complemented and—provided insights that went beyond—the reading I had already done. This semester, I took Professor Adriaan Lanni's Restorative and Transformative Justice class here at Harvard Law School. As I was deciding who to ask to interview for this paper, I thought of two of the guest lecturers from that class. I reached out to them (Professor Lauren van Schilfgarrd and Professor David Karp) and asked to interview them. They agreed, and so did four other ADR professionals from several different law schools. I chose the other four interviewees based on my

understanding of their research interests and how their wide-ranging areas of specialization would help me gain a broader set of perspectives. I also reached out to Mr. Armand Coleman, who is the Executive Director of the Transformational Prison Project. I met Mr. Coleman in person when I attended the "Transforming Justice as a Community" panel event at the Harvard Club of Boston in February that Professor Lanni was a panelist for and Judge Gertner moderated. Mr. Coleman generously agreed to be interviewed but then had timing conflicts that prevented us from ultimately connecting.

The first interviewee was Professor Lauren van Schilfgaarde, who is an Assistant Professor at the UCLA School of Law and the previous Director of the Tribal Legal Development Clinic at UCLA. Before that, she worked at the Tribal Law and Policy Institute. Professor van Schilfgaarde specializes in tribal courts and the implementation of ADR methods in Native American communities. The second interviewee was Neil McGaraghan, who is a Lecturer on Law and a Clinical Instructor at the Harvard Negotiation and Mediation Clinical Program. Mr. McGaraghan was previously a Partner in a private law firm, where he focused on civil commercial litigation. The third interviewee was Professor Alyson Carrel, who is the Co-Director of the Center on Negotiation, Mediation, and Restorative Justice at Northwestern Pritzker School of Law. She is also a Clinical Professor of law there. Previously, Professor Carrel ran a mediation program in the courts with a specialization on child protection and juvenile dependency mediation. The fourth interviewee was Professor Annalise Buth, who is a Clinical Assistant Professor of Law at the Center on Negotiation, Mediation, and Restorative Justice at Northwestern Pritzker School of Law. Professor Buth was previously a legal aid attorney. Her current area of focus is restorative justice. The fifth interviewee was Oladeji Tiamiyu, who is a Senior Clinical Fellow at the Harvard Negotiation and Mediation Clinical

Program. Mr. Tiamiyu specializes in Online Dispute Resolution and is interested broadly in the ways that different actors within our legal system use technology as part of court and court-alternative dispute resolution processes. The sixth interviewee was Professor David Karp, who is the Director of the Center for Restorative Justice in the School of Leadership and Education Sciences at the University of San Diego. He is also a Professor of Leadership. In these roles, Professor Karp focuses on restorative justice in university settings, which happens to align very closely with the age group associated with emerging adulthood (particularly when one considers that Professor Karp's work is with both undergraduate and graduate students).

I conducted all six of the interviews over Zoom. Each one lasted approximately 30 minutes. I asked each interviewee if they were comfortable with me audio recording them for later transcription, and they all agreed. This allowed me to be fully present in the interviews and able to focus on the thread of conversation instead of on taking notes. I also asked each interviewee if they were comfortable with me quoting them by name, and they all said that they were. Because the interviews were designed to be semi-structured, I prepared some questions in advance but also allowed the interviewees' answers to inform what I would ask next.

After the interviews were over, I transcribed them. The transcripts of the interviews are included in the appendix, which is Section IX of this paper. I then qualitatively coded the interview transcripts to identify common themes that might be worth exploring in further depth. I also read any articles that interviewees referenced during their interview. For example, I read an article by Sharon Press and Ellen Deason about embedded assumptions of whiteness in mediation[5] because Professor Carrel mentioned it in her interview. I also read an article about

[5] Press, S. and Deason, E.E., 2020. Mediation: Embedded Assumptions of Whiteness. *Cardozo J. Conflict Resol., 22,* p.453.

Frank Sander's impactful lecture on alternative dispute resolution at the 1976 Pound Conference[6] because Mr. Tiamiyu mentioned it in his interview. Sander was a Professor and Associate Dean at Harvard Law School; he is widely credited with being one of the founders of the field of Alternative Dispute Resolution.

IV. The Neuroscience of Juveniles and Emerging Adults

In the United States, 18 is the age of majority. At least as far as our cultural conception of adulthood goes, 18 is often thought of as the magic number. There are societal rights associated with adulthood that are accessible only once one turns 18, including the right to participate in our democracy by voting.[7] There are also societal responsibilities associated with the age of 18, such as the requirement for men to register for the draft.[8] However, in one of the most serious applications of the distinction between childhood and adulthood, justice system consequences for criminal defendants, the line is often drawn even before age 18. In almost every single state, the "maximum age of juvenile court jurisdiction is 17," although in Georgia, Texas, and Wisconsin it is just 16.[9] Yet in many cases "transfer laws [including statutory exclusion, judicially controlled transfer, prosecutorial discretion transfer, and "once an adult, always an adult" transfer] allow or require young offenders to be prosecuted as adults for more serious offenses, regardless of their age."[10] Twenty two states and the District of Columbia have "at least one

[6] Gray, E.B., 2006. Creating history: The impact of Frank Sander on ADR in the courts. *Negot. J.*, *22*, p.445.
[7] There are some notable exceptions to this. For example, many states, including Illinois, allow 17-year-olds to vote in the primary elections if they will be 18 by the time of the general election (Aragon, 2015). Also, some states, including Florida, systematically prohibit people over the age of 18 from voting if they have a felony conviction and unpaid court fees (Demleitner, 2018).
[8] Kamarck, K.N., 2016. The Selective Service System and Draft Registration: Issues for Congress.
[9] Teigen, A. (2021). *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*. National Conference of State Legislatures.
[10] *Id*.

provision for transferring minors to criminal court for which no minimum age [is] specified," and "most states that specify a minimum age set the minimum at age 14."[11] Clearly, our understanding of adulthood within the context of the criminal legal system is not fixed in place at age 18.

This practice of trying juveniles as adults has become particularly questionable over the last few decades as new neuroscience research reveals the ways that emerging adults up to age 25 continue to experience significant brain development. The discovery of functional magnetic resonance imaging (fMRIs) in 1991 opened the door for insight into measurable blood flow changes in the brain.[12] Along with burgeoning research on brain structure and function came recognition of the fact that areas of the brain that are responsible for cognitive control, decision-making, and understanding the consequences of one's actions continue to develop beyond the age of 18.

While there is some disagreement on the extent to which it is possible, or productive, to identify a generalized age instead of attempting to determine cognitive function of each individual defendant (a variant of the group to individual problem),[13] there is now a fairly high degree of consensus among neuroscientists that this period of acute brain development continues for most people until approximately age 25.[14] This consensus within the field of neuroscience

[11] Office of Juvenile Justice and Delinquency Prevention. (2019). *Minimum Transfer Age Specified in Statute for Juveniles Tried as Adults*. Available at: https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp.
[12] Uludag, K., Ugurbil, K. and Berliner, L. eds., 2015. *fMRI: From Nuclear Spins to Brain Functions* (Vol. 30). Springer.
[13] Faigman, D.L. and Geiser, K., 2021. Using Burdens of Proof to Allocate the Risk of Error when Assessing Developmental Maturity of Youthful Offenders. *Wm. & Mary L. Rev.*, *63*, p.1289.
[14] Hu, J.C. (2022). *A Powerful Idea About Our Brains Stormed Pop Culture and Captured Minds. It's Mostly Bunk.* Slate Magazine. Available at: https://slate.com/technology/2022/11/brain-development-25-year-old-mature-myth.html.

has reached the level where it is now being recognized by professionals in related fields. For example, psychiatrists who specialize in the treatment of mental health disorders have begun to refer to the period in one's life up until age 25 as "the developmental period."[15] It is worth noting, however, that some studies have focused on other ages, such as age 21. For example, a 2016 study found that when faced with negative emotion stimuli, individuals aged 18-21 had prefrontal cortices that more closely resembled teenagers than adults over the age of 21.[16]

I do not go as far as to claim that differences in brain development between juveniles and emerging adults are insignificant. Even 10 years ago, in 2013, there was recognition that the cognitive distinction between late adolescence and young adulthood is both measurable and meaningful in terms of resulting decision-making.[17] The claim I make is a more modest one: that emerging adults up to age 25 have been identified as a population where significant brain development persists—and that, as a result, they should be entitled to special consideration when it comes to accessing Alternative Dispute Resolution processes and diversion pathways.

V. Alternative Dispute Resolution: Historical Context, Definitions, and Barriers to Effective Impact Measurement

Part of what makes Alternative Dispute Resolution difficult to define is its breadth as an umbrella term. As Neil McGaraghan said in his interview, "in my way of imagining ADR, I'm including almost anything that is a method for people to resolve a difference in the way they see

[15] Fusar-Poli, P., 2019. Integrated Mental Health Services for the Developmental Period (0 to 25 years): A Critical Review of the Evidence. Frontiers in Psychiatry, 10, p.355.
[16] Cohen, A.O., Breiner, K., Steinberg, L., Bonnie, R.J., Scott, E.S., Taylor-Thompson, K., Rudolph, M.D., Chein, J., Richeson, J.A., Heller, A.S. and Silverman, M.R., 2016. When is An Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts. Psychological Science, 27(4), pp.549-562.
[17] Veroude, K., Jolles, J., Croiset, G. and Krabbendam, L., 2013. Changes in Neural Mechanisms of Cognitive Control during the Transition from Late Adolescence to Young Adulthood. *Developmental Cognitive Neuroscience*, *5*, pp.63-70.

and understand things as opposed to trying to have those differences resolved by a court or tribunal of some kind." McGaraghan continued on to describe a common characteristic that unifies different forms of ADR: "giving people agency over how they resolve disputes and what's important to them is a real benefit of most forms of ADR. This addresses most people's core interest in agency for themselves and determining what matters to them and what works for them and not having a civil or criminal justice system determine outcomes for them."

A. Historical Context

One of the most well-known scholars within the field of Alternative Dispute Resolution is Carrie Menkel-Meadow. A prolific writer whose perspectives on the field have been influential for decades, Menkel-Meadow continues to grapple with the question of what Alternative Dispute Resolution is (including what it has been historically) and what role it plays in our criminal legal system. As Professor Carrel mentioned in her interview, Menkel-Meadow is scheduled to give "a keynote at [an upcoming] conference where she is going to define the A in Alternative Dispute Resolution or ADR."

Menkel-Meadow's theory of the historical origins of ADR are well-encapsulated by her 2015 paper "Mediation, Arbitration, and Alternative Dispute Resolution (ADR)," which was published in the International Encyclopedia of the Social and Behavioral Sciences. There, she argued that there are two animating concerns that gave rise to contemporary ADR. First, in the 1960s and 1970s advocates for justice "noted the lack of responsiveness of the formal judicial system and sought better 'quality' processes and outcomes for members of society seeking to resolve disputes with each other, with the government, or with private organizations."[18] While

[18] Menkel-Meadow, C., 2015. Mediation, Arbitration, and Alternative Dispute Resolution (ADR). International Encyclopedia of the Social and Behavioral Sciences, Elsevier Ltd.

processes like arbitration have fairly strict rules, negotiation, mediation, and other types of ADR are often seen as individualized ways to achieve outcomes that suit the interests of the parties involved, even if they deviate from abstract conceptions of justice and due process that are the backbone of the court-based legal system.

Because of its origins as a movement arising from the work of advocates for justice in the 1960s and 1970s, ADR has at various times in its history been considered a social movement tool that is decidedly not neutral in its desire to bring about particular, progressive conceptualizations of dispute resolution.[19] Despite this history, ADR has in more recent years been viewed through a more process-oriented than outcome-oriented lens. This has stripped away some of the public recognition of the field's social advocacy origins and resulted in specific forms of ADR, including arbitration and mediation, gaining an air of general acceptability—even among criminal legal system actors who are unwilling to advocate directly for a progressive approach to dispute resolution.

The second animating concern that Menkel-Meadow identified was a historical emphasis on promoting efficiency in the resolution of disputes. As early as the 1970s, and persisting into the subsequent decades, scholars have analyzed court backlogs and concluded that alternative processes that reduce the caseload judges and juries must handle are useful in ensuring more expeditious access to a form of justice that can be equally as acceptable—to both the parties involved as well as society more broadly—as a court-based process.[20]

[19] Barrett, J.T. and Barrett, J., 2004. A History of Alternative Dispute Resolution: The Story of a Political, Social, and Cultural Movement.

[20] Burger, W. (1976). Agenda for 2000 AD—Need for Systematic Anticipation. Federal Rules Decisions, 70, 92–94.

B. Definitions

Beyond its historical context, it is also important to clarify that in this paper, I use the term "Alternative Dispute Resolution" in its broadest possible conception. That includes traditional ADR processes such as arbitration, mediation, and negotiation as well as emerging subfields like Online Dispute Resolution and adjacent practices like restorative justice and healing to wellness courts. I now turn to more specific definitions of each of these terms.

Arbitration is generally understood to involve the use of a neutral third-party adjudicator who makes a decision after zealous advocacy on behalf of both parties' attorneys.[21] Even if the parties do not agree on a solution, they generally are not able to return to a traditional court process; the arbitrator makes the final decision, which is only possible for a judge to overturn under very narrow circumstances. Arbitration is more commonly used in civil and commercial contexts and has recently been the subject of scholarship focusing on the ethical implications of forced arbitration[22] and the use of arbitration to resolve international and cross-border disputes.[23]

Mediation, by contrast, does not involve the use of a third-party adjudicator. The mediator or pair of mediators act more as neutral facilitators who help the parties express their interests and reach a conclusion that they (the parties) find acceptable. If the parties cannot come to an agreement, they have the option to return to court and have the judge make a decision. In this situation, there are usually strict protections that prevent the mediators from disclosing information revealed during the mediation to the judge. There are several different theories of

[21] Nolan-Haley, J., 2012. Mediation: The New Arbitration. Harv. Negot. L. Rev., 17, p.61.
[22] Szalai, I.S., 2018. The Failure of Legal Ethics to Address the Abuses of Forced Arbitration. Harv. Negot. L. Rev., 24, p.127.
[23] Cuniberti, G., 2008. Beyond Contract—The Case for Default Arbitration in International Commercial Disputes. Fordham Int'l LJ, 32, p.417.

mediation that are practiced variously depending on the mediator training program and local mediator guidelines. One of the key distinctions is between facilitative and evaluative mediation.

In a facilitative mediation process, the mediator will focus on the process and facilitate the parties' interactions such that the parties have the best possible opportunity to express their interests, generate options for how to resolve the dispute, and decide on an agreement that they are both willing to sign. However, under the facilitative model the mediator will not offer suggested options to the parties or tell the parties what they believe about the strength of the parties' respective cases if they do return to court.[24] Success in facilitative mediation can sometimes be about how well each of the parties believe that they have been able to express their perspectives and understand the perspectives of the other party.

By comparison, an evaluative model of mediation empowers the mediator to focus on outcome and facilitate the parties' interactions such that they have the best possible opportunity to come to an agreement that is agreeable to the parties and also succeeds in removing the case from the court's docket. The mediator can suggest options for the parties to consider and can offer opinions about how likely each party is to succeed if they decide to return to court.[25] For this reason, evaluative mediators are often retired judges; retired judges are particularly desirable as evaluative mediators because they have sufficient experience with the court system such that they can give an accurate prediction of the case's likely outcome in court.[26] Success in evaluative mediation is often about whether or not the parties agreed to an outcome that removes the need for the court to allocate additional resources to resolving their dispute. The subset of evaluative mediation that involves the mediator bringing their own subject matter or criminal system

[24] Zumeta, Z., 2000. Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation. National Association for Community Mediation Newsletter, 5.
[25] *Id*.
[26] Stitt, A., 2016. *Mediation: A Practical Guide*. Routledge.

expertise to the mediation and using that information to actively encourage the parties to negotiate until they reach an agreement is called directive mediation.[27] Directive mediation is also sometimes called advisory mediation.

Negotiation is a broad-ranging practice that includes everything from settlement negotiations to plea bargaining. It can include intentional discussion of value-creating options that arise from a careful consideration of both parties' interests, but it can also include positional bartering in which the goal is to settle on a number or set of conditions that are as similar to one's preferred initial position as possible (without consideration of the other party's interests).[28] Negotiation has historically been taught to business professionals as part of leadership courses and MBA degrees, but in the last few decades it has grown in popularity in other educational spaces—including law schools.[29]

Online Dispute Resolution, as Oladeji Tiamiyu explained in his interview, is a "sub-variation of ADR that [focuses on] how courts and non-court processes are engaging with information communication technology tools." Tiamiyu points to Online Dispute Resolution processes as a way to "[grapple with the] question [of how] we promote greater comfort and ease for parties who are trying to have their day in court or access some type of dispute resolution process." He sees technology as a tool that can "expand whose voices are being heard when a wrong has happened."

Although some people use the terms "restorative justice" and "restorative practices" interchangeably, to some there are meaningful distinctions between the two terms. In her

[27] Bush, R.A.B., 2002. Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field. *Pepp. Disp. Resol. LJ*, *3*, p.111.
[28] Schneider, A.K., Ebner, N., Matz, D. and Lande, J., 2017. The Definition of Negotiation: A Play in Three Acts. *J. Disp. Resol.*, p.15.
[29] Moberly, R.B., 1998. Introduction: Dispute Resolution in the Law School Curriculum: Opportunities and Challenges. *Fla. L. Rev.*, *50*, p.583.

interview, Professor Annalise Buth explained that she sees "'restorative justice' as a framework that focuses on right relationship with self and its interconnection with right relationship with others as well as the natural world, and 'restorative practices' then fall under that framework in terms of practices that support the paradigm shift, that support right relationship, that support repairing harm when there's a breakdown in relationship." Professor David Karp echoed this distinction in his interview when he explained that "'Restorative justice' really refers to the general philosophy around harm and responsibility, and 'restorative practices' usually refers to the particular methods that are used." Professor Karp went on to describe how "restorative practices" can include a wide variety of different methods for resolving disputes or addressing harm, including community building circles, restorative chats, community concern circles, family group conferences, and victim offender dialogues.

As Professor Lauren van Schilfgaarde explained in her interview, "a healing to wellness court is the tribal version of a state drug court… the cases they handle could be adult criminal, juvenile delinquency, and there are also family cases—those are usually tied to a child welfare proceeding." Professor van Schilfgaarde went on to explain that the common unifying characteristic is that "somebody has a diagnosable substance use disorder and is in need of frequent and immediate intervention for that substance use disorder as well as a causal connection that their involvement with the justice system is because of their substance use disorder—either it triggered the child welfare case or was why they committed a crime." Some healing to wellness courts are called healing courts, and non-tribal courts referred to as drug courts are often considered to be substantially similar in focus and approach.[30]

[30] Flies-Away, J.T., Gardner, J. and Carrow, C., 2014. Overview of Tribal Healing to Wellness Courts. *Annotation*.

These methods of Alternative Dispute Resolution are well-established enough that there are substantial bodies of academic literature on each of them, but a problem still persists whereby ADR practitioners use similar words but mean different things depending on geographic jurisdiction and the court or non-court context in which they operate. Professor Alyson Carrel touched on this point in her interview when she described how "the terms that [people] use might be the exact same, but what [the ADR process they're describing] actually looks like in practice can be very different." She went on to explain how she has personally "worked in mediation in Florida, in Missouri, and in Illinois, and the differences across those three places in how mediation was used, how the courts embraced alternative processes, the training that mediators received, and what was considered best practices for mediators was very different in each of those places." Instead, she argues that there can only be true understanding of what ADR terms mean when "you're part of the group creating, designing, and evaluating [a particular ADR process]."

C. Barriers to Effective Impact Measurement

Professor van Schilfgaarde identified a different, but related, obstacle when she explained how challenges around impact measurement have chronically plagued efforts to expand the funding available for Alternative Dispute Resolution options, especially within tribal communities: "Tribes are separate sovereigns from the federal government but they're also separate from each other. There are similarities, but it's difficult to make an apples to apples comparison across tribes… [the measures for whether a] program is successful are usually done in clinical settings, [which] tend to be [in] urban areas. This is not a great fit for a comparison for whether it will be good for tribes."

Concerns about impact measurement are relevant outside of the tribal context too; ADR practitioners routinely lament the fact that largely qualitative outcomes that contribute to community cohesion are difficult to quantify for grant funders. More concrete metrics of success, such as lower recidivism rates,[31] are useful but fail to convey a holistic picture of the benefits of ADR processes. This is particularly true for restorative justice processes that are designed to happen routinely and preventatively as a way of maintaining connection among members of a community—not in response to a particular instance of harm.[32]

VI. Argument and Analysis

In this section of the paper, I present the key themes that arose from qualitatively coding the transcripts of the six semi-structured qualitative interviews that I conducted.

A. The Suitability of Different Types of Alternative Dispute Resolution for Juveniles and Emerging Adults

During my discussion with Dr. Kinscherff about this paper topic, he raised the point that youth who believe they are respected and listened to are much more likely to accept the outcome of a dispute resolution process. Court proceedings can be anger and anxiety-inducing.[33] Professor van Schilfgaarde described appearing at court proceedings as a "passive" experience for defendants, particularly because most criminal defendants do not testify on their own behalf, for strategic reasons. By comparison, ADR processes frequently create a setting where it is more likely to be possible for the defendant to participate actively and speak up about how they feel and what they are hearing and learning from others around them. For exactly this reason,

[31] Lanni, A., 2021. Taking Restorative Justice Seriously. *Buff. L. Rev.*, *69*, p.635.
[32] Bazemore, G. and Elis, L., 2013. Evaluation of Restorative Justice. In *Handbook of Restorative Justice* (pp. 419-447). Willan.
[33] Marshall, B.K., Picou, J.S. and Schlichtmann, J.R., 2004. Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms. *Law & Policy*, *26*(2), pp.289-307.

Alternative Dispute Resolution processes often require a higher level of emotional engagement—and often a higher upfront time commitment—from defendants, as compared with appearing at a court proceeding.

Critics of expanding the use of ADR processes to address harm created by juveniles and emerging adults point to the fact that many juveniles and emerging adults lack the emotional maturity necessary to engage meaningfully with the ADR process. Professor Karp works primarily with restorative justice systems for undergraduate and graduate students at universities, which allows him to develop insight into exactly the population of emerging adults that this paper is considering (those aged 18-25). Professor Karp discussed this at length during his interview, as evident in the excerpt below:

> *"A conservative take on restorative justice would be a high litmus test: 'we'll refer this case to restorative justice because the participants are perfect for it.' They have a high level of self awareness. The person who caused the harm is willing to take full responsibility for it. They are willing to engage restoratively. They have very good community skills or high Emotional Quotient or some standards… Other restorative programs will really think of the restorative process as a way to educate and help people grow and develop, and so you might engage people who don't have all of those skills but learn them through this process. When we talk about youth based restorative justice, we're often talking about it being the vehicle for people to learn from their mistakes—literally, not just 'You're going to learn from this' or 'We're going to teach you a lesson' in a punitive way, but 'we're going to help you grow from this difficult situation.'"*

Professor Karp goes on to explain the importance of being committed to the restorative justice process, even for people who need additional support before they can participate in a restorative justice circle or conversation with the parties they have harmed:

> *"If you have a young person who isn't particularly well suited [to restorative justice] who then is punished in a way that further marginalizes them, they're still in our community. Our goals should always be, whether they're perfectly suited or they have a lot to learn, to help them become better members of our community. So I think there is a false dichotomy between 'good for restorative justice because they're perfect for it' and 'bad for restorative justice, so we shouldn't refer them to this process.' I think it's more about the commitment to a full restorative process and a full preparation process—for example, in one case male students who had made a sexist social media group about their*

> *female classmates had to go through some gender and sexual violence education before they engaged in a dialogue with the harmed parties. So that was part of their educational preparation for a specific restorative dialogue, but also part of a restorative process that augmented their emotional intelligence and personal growth."*

I agree with Professor Karp's analysis of the ways that restorative justice can be responsive both to juveniles and emerging adults who are already emotionally attuned enough to engage in a process straight away as well as to juveniles and emerging adults who require additional preparatory support before they are able to engage respectfully and maturely in a restorative justice process. In her interview, Professor Buth explained how this dynamic can cause ADR processes to create a net-widening effect: "sometimes we see a case that would have been dismissed, but then a prosecutor or judge might say 'Oh, I really want this young person to have the opportunity to sit in circle with the person they've harmed, so we'll continue to move the case forward so that they can have this opportunity.'"[34]

Neil McGaraghan also discussed the suitability of ADR processes for juveniles and emerging adults in his interview. McGaraghan emphasized how useful it is that young people are able to learn new things more easily than older adults: "a younger person might have some greater capacity to be coached about a different way of resolving disputes, to be coached about the principles of ADR that they might find helpful." He argued that one should consider ADR to be a tool and that "there is potentially huge benefit to introducing young people to tools that then allow them to make that tool a more normalized part of the way they think about dispute resolution." In other words, if we can introduce young people to alternative methods by which to

[34] The concept of net-widening has been prevalent in discussions about the criminal legal system for decades. In general, it involves increasing the scope of social control over criminal defendants or parties in a dispute. This can include restrictions on one's behavior, location, and ability to interact with others. It has also been studied more specifically in the context of courts relying on electronic monitoring as a stand-in form of social control in the wake of decarceration efforts (Mainprize, 1992).

resolve disputes, they will use their capacity for growth and learning to apply that framework to other conflicts they encounter in the future.

Later in his interview, Neil McGaraghan mentioned how adulthood is associated with a "person's ability to appreciate consequences, to be responsible, to make good judgments, and to understand cause and effect." He went on to suggest that "all of those ways in which the developing brain is a sponge for new techniques also means that there could be limitations to how well that developing brain is able to effectively use the ADR models." However, by the end of the interview McGaraghan reiterated his support for a "system where young people are introduced to Alternative Dispute Resolution tools as early as possible so that they are able to build on them and incorporate them into the way they think about the world, think about each other, and think about themselves."

B. Juvenile and Emerging Adult Defendants in the Context of Native American Communities: Tribal Courts and Healing to Wellness Courts

Before she was the Director of the Tribal Legal Development Clinic at UCLA, Professor van Schilfgaarde was "the tribal law specialist at the Tribal Law and Policy Institute, which provides training and technical assistance to tribes and tribal courts."[35] In that role, she developed an understanding of tribal courts, healing to wellness courts, and how tribal culture can create a community setting that increases how well-suited juveniles and emerging adults are to Alternative Dispute Resolution processes:

> *"Tribes have sovereignty to operate their own courts, but it it's heavily restricted. And so the practical outcome is that tribes have a sentencing limitation, primarily to one year, and their jurisdiction is pretty much exclusive to natives… tribes are implementing their justice systems in sort of a unique context. On one hand they are attempting to implement the western system that has been imposed on them and is imposed by an implicit or explicit recognition that a western criminal justice system is the only legitimate way to implement a criminal justice system… But tribes are also either continuing to operate or*

[35] van Schilfgaarde, L. (2023). *Interview with Professor Lauren van Schilfgaarde*.

[are] revitalizing their own traditional systems of justice, which have some analogies to restorative justice."

Because of these structural jurisdictional limitations on what tribal courts can do, they have used Alternative Dispute Resolution practices to bolster the options available to respond to a harm in the community. Professor Schilfgaarde explained that there is particular incentive to address harm restoratively because tribal communities are often small enough that if they responded to every harm with incarceration, they simply wouldn't have enough people left in the community. This desire to address harm restoratively, especially common harms like those arising from substance use disorders, has led to the proliferation of healing to wellness courts. Professor van Schilfgaarde shared her thoughts on how healing to wellness courts are an example of an Alternative Dispute Resolution process that is appropriate for people of all ages but should be customized to more fully meet the needs of juveniles and emerging adults:

"For everybody involved in the healing to wellness courts, trauma is generally considered. Something is going on there that's going to need at least a trauma-informed response. I think the substance use is a tricky thing that deeply informs this neurological issue that we're trying to get at and is a total difference between an adult and a juvenile model. But the fact that this is blurry and that we don't fully understand it yet is all the more reason why I think it's really interesting to target juveniles and young adults, because their behavior is clearly motivated by something that is totally different, and we also just know how resilient kids are. I think that is sometimes used as an excuse, but in this case I think it's a real invitation. There's so much potential to be saved here. It's so clear that these are not lost causes. Not that we should necessarily be targeting our resources like that—but maybe we should. We have finite resources and we know that kids are saveable. We should be saving them and not throwing away the key."

For Professor van Schilfgaarde, "saving" kids is particularly feasible in tribal communities because there is a strong cultural tradition that they can engage with as a way to strengthen their ties to the community:

"[In tribal communities], culture offers a centering that is really beneficial… By participating in cultural activities, 99% of the time that requires being around other people, negotiating a ceremony, helping prepare for it, cleaning up after it, engaging with elders, and just generally being around and being useful in a way that's actually

> *really empowering—and it also involves being seen as a decent person, which is the opposite of what a criminal label does. It has obvious roles in community reintegration, reestablishing trust between the person and the community… in a way that's really hard to duplicate in non-native communities. There's just not this obvious thing that taps both into the community but also into history and your ancestors and a source of pride."*

Professor van Schilfgaarde's comments raise questions about how effective Alternative Dispute Resolution processes can be in settings where the juvenile or emerging adult does not have a close-knit community with long-held cultural traditions in which they can be instructed to participate. However, her reflections do highlight the unique opportunity available to juveniles and emerging adults in tribal communities while implicitly suggesting that community building circles in non-native communities could help to build a level of community cohesion that would be useful for the rehabilitation of juvenile and emerging adult defendants in the future.

C. The Importance of Law Students and Lawyers Being Educated on Alternative Dispute Resolution Processes, Including Online Dispute Resolution

For Oladeji Tiamiyu, attorneys who are unaware of how different Alternative Dispute Resolution processes function are doing their clients a disservice. At a broad level, vanishing jury trials at both the state and federal level[36] have led all civil litigation and criminal attorneys to become de facto users of Alternative Dispute Resolution processes, even if only through the experience of engaging in settlement negotiations and plea bargains.[37] Tiamiyu explained in his interview that "certain types of disputes can be ill-suited to a certain type of process." Attorneys who are unaware of the details of different Alternative Dispute Resolution processes may opt for traditional court proceedings when an ADR option would better serve the interests of the client. At the same time, even once an attorney chooses to recommend ADR to their client, the details

[36] Staszak, S., 2022. Explanations for the Vanishing Trial in the United States. *Annual Review of Law and Social Science*, *18*, pp.43-59.
[37] Ortman, W., 2021. Confrontation in the Age of Plea Bargaining. *Colum. L. Rev.*, *121*, p.451.

about which ADR process to recommend are also important. One application of this principle with regard to juvenile and emerging adult defendants is the need for confidentiality:

> *"From the restorative justice perspective, you're interacting with the community. So things that you share through a restorative justice process will not be confidential, or at least it will be less confidential to a larger subset of people… Compare that to mediation, which is something that—at least with a substantial part of mediation processes—is designed to be confidential and is especially designed to not have subsequent legal consequences for issues that are raised in mediation or a subsequent in-court proceeding… When there is a shared interest around confidentiality, I can't imagine that restorative justice would be the ideal form for parties to interact, and mediation might be a better fit. In contrast, there are a variety of different legal issues that juveniles and emerging adults experience that have a direct relationship with community, and they would benefit from some type of community intervention."*[38]

Overall, an attorney who is unaware of this structural difference between restorative justice and mediation may improperly advise their client about how to proceed when faced with a variety of different dispute resolution options.

Another way that attorneys run the risk of improperly advising their juvenile and emerging adult clients is by failing to account for the distinction between clients who are digital nomads and clients who are digital natives. As Tiamiyu explains, digital nomads are people who "were born before the growth of the internet, or before even the ubiquity of the internet vis-a-vis today," while "digital natives are people who were born with the internet, where the internet was more or less ubiquitous." He goes on to explain this distinction, and the implications for the attorney-client relationship, further:

> *"If you are a counsel to a party who is a digital native, and that is the vast majority of juveniles or emerging adults, there is a great likelihood that they have a decent amount of comfort in online space—and perhaps they prefer interacting in highly contentious situations remotely… if a counsel isn't conscious of the reality that many of their juvenile or emerging adult clients prefer meeting online or would like to interact to some degree online, that could really be a disservice to those clients… Once a client is removed from ideal environmental conditions, in this situation you could say if they prefer being online and if they are removed from that, then how easy will it be for an attorney to foster trust when you are requiring them to do something that they are less comfortable with?"*

[38] Tiamiyu, O. (2023). *Interview with Senior Clinical Fellow Oladeji Tiamiyu*.

Tiamiyu's concerns make sense against the backdrop of his interest in Online Dispute Resolution (ODR), which is a sub-variation of ADR that focuses on digital communication tools. The use of ODR in court proceedings, court-adjacent ADR processes, and ADR processes that are not affiliated with a court has accelerated tremendously over the last three years as a result of the COVID-19 pandemic. Reflecting on this change, Tiamiyu commented that "the technology spin for me has kind of grown in response to the pandemic and just seeing how ADR practitioners and courts are grappling with and trying to figure out 'What is an ideal relationship between formal processes and technology?' and the extent that technology can expand who has access to justice but also raises certain complications for how individuals are interacting with justice systems." I think these questions are both essential to consider and essentially unanswerable without more information about how Online Dispute Resolution processes are received over the next few years. This is an area where further study, perhaps with more hindsight as we move temporally away from the pandemic, will be essential.

D. Separation Between the Court and Alternative Dispute Resolution Processes: The Reality Versus the Ideal

Thus far, this paper has discussed different Alternative Dispute Resolution processes without specific attention toward the distinction between ADR processes that are operated through the courts directly, ADR processes that are operated by partner organizations that receive referrals from the courts, and ADR processes that occur organically in the community without the involvement of courts.

In her interview, Professor Carrel described the reality of how interconnected the courts and most Alternative Dispute Resolution processes are:

> *"Any of the nonprofits I've worked with are still part of the system. They're still getting cases from the state's attorney's office or from the detention center or from the courts, even if it is such that the cases are then closed. It's still, in the large picture, part of the*

> *system. There are actual restorative justice hubs in the community that are doing things that are not touched by the police and by the court system. If we're talking about those places, where things are taking place because a community member sees a harm, a community member is convening a circle, and a community is then engaging in this conversation, then yes, I think that has tremendous promise. But anything that's a nonprofit receiving referrals from the court, even if that is a restorative justice hub in the community, you're making a decision [to participate] in the shadow of the law. You're making a decision based on 'What will happen if I don't participate in this?' So that just changes things."*

Professor Annalise Buth agreed with Professor Carrel on the importance of creating separation between the ADR process and the court system. For Professor Buth, the ideal situation is one that would circumvent the court process entirely when a harm occurs:

> *"Ideally, somebody would have access and opportunity to sit in circle before there was any involvement of the legal system. A harm happens, and somebody could go to a community-based group to say 'We would like support in coming together to repair this harm.' That wouldn't involve the legal system in any way… I think early on in my career I saw a lot more potential in terms of reform. The more experience I gain, the more I see a need for real transformation. That doesn't mean that there can't be reform or harm reduction in terms of the system that already exists, but I do believe we need some fundamental change within the legal system."*

On one hand, I see how Professor Carrel and Professor Buth would be concerned about satisfying the core principle of voluntariness[39] when participants are deciding to participate in an Alternative Dispute Resolution process because of the threat that they will have to go through a traditional court process if they decline to do so. On the other hand, I struggle to imagine how Alternative Dispute Resolution processes would be scalable if they could not be connected with the criminal legal system even for the purpose of receiving referrals.

[39] Voluntariness is a core principle in most, but not all, forms of Alternative Dispute Resolution. For example, it is a core principle of both mediation and restorative justice but not of arbitration—particularly in light of the ever-increasing prevalence of mandatory arbitration clauses in many commercial contracts (Colvin, 2019).

E. Comparative Case Studies

In recognition of space constraints, I delve only briefly into comparative case studies of how Alternative Dispute Resolution processes are used internationally.

In New Zealand, family group conferences have been used since 1989 when responding to situations where people up to age 18 have broken the law. A Youth Justice coordinator coordinates the conference and ensures that the juvenile, their family, the victim, and the police can all attend. The primary goal of these conferences is to help the person who broke the law find solutions, in conversation with the other people involved in the case, that can address the harm and allow them to make amends. Another primary goal is the prevention of future reoffending. This restorative framework, which incorporates social workers and traditional Māori culture, originates from New Zealand's Oranga Tamariki Act 1989, which requires situations where juveniles have broken a law to be approached with attention to "the wellbeing and best interests of [juveniles], the public interest (including public safety), the interests of any victim, [and] the accountability of tamariki and young people for their [behavior]."[40] Family group conferences have subsequently been adopted in Australia[41] and are influential in contemporary thinking in the United States about best practices for designing group conferences in the middle and high school setting.[42]

In the United Kingdom, restorative practices are "embedded and routine in their criminal justice system."[43] Although restorative practices have taken a variety of forms in the UK since

[40] Oranga Tamariki — Ministry for Children. (2017). *Youth Justice Family Group Conferences*. Available at: https://www.orangatamariki.govt.nz/youth-justice/family-group-conferences/.
[41] Ashworth, A., 2019. Victims' Rights, Defendants' Rights and Criminal Procedure. In *Integrating a Victim Perspective Within Criminal Justice* (pp. 185-204). Routledge.
[42] Fronius, T., Darling-Hammond, S., Persson, H., Guckenburg, S., Hurley, N. and Petrosino, A., 2019. Restorative Justice in US Schools: An Updated Research Review. *WestEd*.
[43] Karp, D. (2023). *Interview with Professor David Karp*.

being introduced in 1974 through a victim-offender reconciliation program that originated in Canada, "[the current approach to restorative justice in the UK is victim-led], whereby victims can request a restorative intervention at any stage during the criminal justice process."[44] The UK government, through its Ministry of Justice and with input from the UK Restorative Justice Council, has "developed a Code of Practice for Victims of Crime and a victim strategy, which includes victim's entitlements to support, including [restorative justice]. Funding for [restorative justice] is available to all police and crime commissioners."[45] In the United States, restorative practices are variously centered on the impacted party (victim-centered), the responsible party (offender-centered), and not specifically centered on either party.[46] The focus does change some of the procedure around how the restorative practice is initiated and operationalized.

In conversations about restorative justice in South Africa, the traditional African concept of ubuntu, or shared humanity, is central. Ubuntu is an African philosophy that extends beyond the borders of South Africa and emphasizes "the restoration of victims and the reintegration of the offender back into the community."[47] In addition, it prioritizes "the restoration of relationships and social harmony undermined by the conflict."[48] This philosophy has some similarities to the approach taken by tribal communities and described in her interview by Professor van Schilfgaarde. Ubuntu is structured around collecting input from every community member who is present and making decisions through consensus. It provides a powerful example of what true collective decision making in response to harm looks like.

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[44] College of Policing. (2022). *Evidence Briefing: Restorative Justice*. Available at: https://www.college.police.uk/guidance/restorative-justice/evidence-briefing.
[45] *Id*.
[46] Green, B.A. and Bazelon, L., 2019. Restorative Justice from Prosecutors' Perspective. *Fordham L. Rev., 88,* p.2287.
[47] Oko Elechi, O., Morris, S.V. and Schauer, E.J., 2010. Restoring Justice (Ubuntu): An African Perspective. *International Criminal Justice Review*, *20*(1), pp.73-85.
[48] *Id*.

VII. Conclusion

Juveniles and emerging adults up to age 25 are still experiencing significant brain development. They have an incredible capacity for growth and learning, which includes developing their emotional maturity through engagement with Alternative Dispute Resolution processes. Both despite and because of their unique neuroscience, I argue that juveniles and emerging adults are well-suited to ADR. This is an area of the neuroscience, sociology, and ADR academic literature where additional research would be helpful.

Hopefully, with more research, it will become possible to update our societal understanding of emerging adults and change criminal legal system policies to match. However, there are feasibility concerns that make this difficult to imagine. As Professor Karp shared in his interview, in the United States, restorative justice is increasingly seen as political:

> *"[Restorative justice has] become politicized as it has become associated with different moments, like the Black Lives Matter movement. 10-15 years ago, there was a movement called 'right on crime,' which was a pretty conservative criminal justice reform effort coming from the political right and embracing restorative justice. I think that acceptance is gone, probably gone for good, because the political right has rejected restorative justice as a "woke" phenomenon, and so they're not interested in what were previously conceived of as very conservative principles around an individual taking responsibility for harm."*

It is possible that other forms of Alternative Dispute Resolution will escape the politicization that restorative justice is experiencing, but even then advocates of ADR as a more widespread option for juvenile and emerging adult defendants would need to contend with conservative state legislatures that want to appear tough on crime.

Finally, although the focus of this paper is on juveniles and emerging adults, it is important to remember that adults aged 25 and older are also worthy of the self-determination and emotional maturity capacity-building that comes from engagement with ADR.

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July 7, 2023

The Honorable Stephanie Dawkins Davis
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Dear Judge Davis:

I am a rising third-year student at Wayne State University Law School writing to apply for a clerkship in your chambers for a one-year term beginning in August 2024.

As an aspiring public interest attorney with extensive research and writing experience, I believe I would be a strong addition to your chambers. As a graduate student in Middle Eastern and North African Studies, I conducted extensive research in archives and libraries in France and Morocco and wrote a provoking master's thesis. While in law school, I further honed my legal research and writing skills as a student in the Immigration and Appellate Advocacy Clinic and as a research assistant to Professor Paul Dubinsky and Professor Gregory Fox. Even with a generous level of extra-curricular and employment commitments, I am currently ranked 1st in my class overall.

My resume, writing sample, and academic transcripts are enclosed. In support of my application, you will soon receive letters of recommendation from Professor Daniel Ellman, Professor Jonathan Weinberg, Professor Paul Dubinsky, and Professor Rebecca Robichaud.

Should you require additional information, please do not hesitate to contact me. Thank you for your time and consideration.

Sincerely,

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Supported attorneys in representing clients in housing, benefits, trust and estates, and family law cases. Performed legal research, observed court dockets, and conducted eligibility intakes. Obtained information and documents from clients. Kept detailed notes and documents in case files.
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Armed Conflict Location and Event Data Project, Remote
Research Assistant, Part-time, May 2017 – December 2018
Collected, reviewed, and managed daily indexed political violence data on the Middle East, Kashmir, and Afghanistan. Translated French language sources and complied with strict data input procedures.
The Nationalities Services Center, Philadelphia, PA
Refugee Resettlement Case Manager, Full-time, May 2016 – January 2017
Managed all pre and post arrival social services for refugee families in compliance with the U.S Office of Refugee Resettlement. Provided direct service support to families by facilitating regular home visits, accompaniment to various appointments, and consistent advocacy to aid refugees with their transition to life in the United States.
The University of Michigan, Department of Art History, Ann Arbor, MI
Graduate Student Instructor, Part-time, January 2014 – May 2015
Graded assignments and facilitated class discussions for three undergraduate courses: *Gender and Popular Culture*, *Art in the American Century*, and *Realism and Impressionism*.

LAW SCHOOL CLINICS & EXTERNSHIPS

Immigration Appellate Advocacy Clinic, Wayne Law School, January 2023 – Present
Represented client in appeal before the Board of Immigration Appeals.
Holistic Defense Externship, **Wayne Law School,** September 2022 – December 2022
Interdisciplinary coursework with Wayne Law and Wayne State School of Social Work. Placement as legal extern at Neighborhood Defender Service Detroit.

LANGUAGES

French – Fluent
Arabic – Basic
Spanish – Beginner

PROFESSIONAL TRAININGS

National Lawyers Guild, Legal Observer Training, Virtual, June 2020
Trauma 107, Trauma Informed Cultural Sensitivity, United Way of Greater Philadelphia, February 2020.
40 – Hour Basic Immigration Law Training, Mennonite Central Committee, Akron, PA, September 2019.

WAYNE STATE UNIVERSITY

Office of the Registrar
Detroit, Michigan 48202
(313) 577-3531

Student No:004857023
Juliet A Happy
Course Level : Law

Date Issued:24-JUN-2023 OFFICIAL

Record of: Juliet A Happy

2210 Hunt Club Dr.
Bloomfield Hills, MI 48304

Issued To : JULIET ANNE-HORRIGAN HAPPY

Course Level : Law

Only Admit: Fall 2020
Last Admit: Fall 2020

Current Program
College : Law School
Major:
Juris Doctor Evening

INSTITUTION CREDIT:

Fall 2020
F20':Grading Optional P/NC in Remote Exam Courses

Subj	No.	Title	Cred	Grade	Pts	R
LEX	6100	Civil Procedure A (Dubinsky)	3.00	A	12.00	
LEX	6200	Contracts A (White)	3.00	A	12.00	
LEX	6400	Lgl Rsch & Wrtng (Mayer)	2.00	A	8.00	

Earned Hrs	GPA-Hrs	QPts	GPA
8.00	8.00	32.00	4.00

Winter 2021

Subj	No.	Title	Cred	Grade	Pts	R
LEX	6101	Civil Procedure B(Eve)Dubinsky	3.00	A	12.00	
LEX	6201	Contracts B(Eve)White	3.00	A	12.00	
LEX	6400	LegalRsrch&Writing(Eve)Mayer	2.00	A	8.00	

Earned Hrs	GPA-Hrs	QPts	GPA
8.00	8.00	32.00	4.00

Fall 2021

Subj	No.	Title	Cred	Grade	Pts	R
LEX	6600	Torts (Dillof)	4.00	A	16.00	
LEX	6700	Con Law I (Rothchild)	3.00	A	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
7.00	7.00	28.00	4.00

INSTITUTION CREDIT:

Winter 2022

Subj	No.	Title	Cred	Grade	Pts	R
LEX	6300	Criminal Law(Eve)Robichaud	3.00	A	12.00	
LEX	6500	Property(Winter)	4.00	A	16.00	
LEX	7606	Mvmnt Lwring(Hammer/Granberry)	2.00	A-	7.34	

Earned Hrs	GPA-Hrs	QPts	GPA
9.00	9.00	35.34	3.92

Fall 2022

Subj	No.	Title	Cred	Grade	Pts	R
LEX	6800	Professional Responsib(Fadler)	2.00	B+	6.66	
LEX	7408	International Law (Fox)	3.00	A	12.00	
LEX	8517	HolisticDefExt:Prc(Ellman)ELR	2.00	H	0.00	
LEX	8518	HlistcDefExt:Collq:(Ellman)ELR	2.00	A	8.00	
SW	6991	ST:Holistic Defense	2.00	CR	0.00	

Earned Hrs	GPA-Hrs	QPts	GPA
11.00	7.00	26.66	3.80

Winter 2023

Subj	No.	Title	Cred	Grade	Pts	R
LEX	7006	AdminLaw(Hall)	3.00	A	12.00	
LEX	7127	ConstitutionlLitigtn(Goodman)	3.00	A	12.00	
LEX	7156	Corporations(JD)Sugar	4.00	B+	13.32	
LEX	8645	ImgrApAdCl/RobichaudWeinbe/ELR	3.00	A	12.00	

Earned Hrs	GPA-Hrs	QPts	GPA
13.00	13.00	49.32	3.79

Spring/Summer 2023

LEX	7990	Directed Study(JD)	2.00	In Prog	Course	

Transcript Totals	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	52.00	203.32	3.91
TOTAL TRANSFER	0.00	0.00	0.00	0.00
OVERALL	56.00	52.00	203.32	3.91

----------END OF TRANSCRIPT----------

Registrar

WAYNE STATE
Law School

Daniel Ellman
Assistant Professor (Clinical) of Law
Director of Externship Programs

June 26, 2023

Dear Judge,

I am writing to highly recommend Juliet Happy for the open position as a judicial law clerk in your chambers. Juliet is an exemplary student, a talent in the field, and a compassionate person. I am confident that her intelligence, work ethic, and insightful approach to the law would fantastic assets to your office.

I am an assistant clinical professor and the Director of Externships at Wayne State University Law School. I had the pleasure of working with Juliet when she was a student in the Holistic Defense Externship, a unique interdisciplinary program in which law and social work students work at a legal service provider practicing holistic public defense, and take a corresponding colloquium course. As an extern at Neighborhood Defender Services of Detroit, Juliet provided critical holistic services, including advising clients, meeting with family members to draft a mitigation letter, and performing detailed legal research, including a motion to sever charges. Her supervisor highlighted her "great professional skills," and considered her a "hard worker" who collaborated incredibly well with her colleagues. In class, Juliet was just as impressive. Her writing is advanced; she conveys difficult concepts in clear fashion, making ideas relatable and interesting to any reader. In one written assignment, she analyzed the effects of online court proceedings on lawyers, judges, and parties, demonstrating the ability to place herself in others' shoes. In another, Juliet considered how her interactions with a client and their mother could bridge a relational gap that had existed for years, all the while showing careful attention to professional rules of confidentiality and respect for the client's privacy. For the course's final project, Juliet engaged in a nuanced analysis of *Padilla v. Kentucky* and its progeny, applying relevant caselaw to a new situation to create a highly persuasive legal argument.

Adding to this excellence, Juliet has been a leader at the Law School. She was a founding member of a new student group, Wayne Defenders, which united law and social work students in an interdisciplinary fashion. In doing so, she laid the groundwork for future students, creating opportunity for those who will follow in her footsteps. She also serves as an associate editor on the Journal of Law in Society and secretary of the National Lawyers Guild, Wayne Law Chapter.

Finally, one of Juliet's most outstanding qualities is her calm demeanor and ability to put others at ease. I have met with Juliet many times during her law school career. Each time, Juliet exhibits a genuine care and compassion for others and fosters an environment where everyone feels welcome. I have no doubt she would bring these invaluable interpersonal qualities to any office she joins.

In sum, Juliet has stood out in every way during her time at Wayne Law. She would be a wonderful member of any chambers. I'd be happy to answer any questions you might have.

471 W. Palmer St. • Detroit, MI 48202 • ellmand@wayne.edu

Daniel Ellman
Assistant Professor (Clinical) of Law
Director of Externship Programs

Sincerely,

Daniel Ellman

Daniel Ellman, J.D., M.S.T.
Assistant Clinical Professor
Director of Externships
Wayne State University Law School
471 W. Palmer Street
Detroit, MI 48202
ellmand@wayne.edu
(313) 577-1897

July 08, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to you to recommend Juliet Happy as a judicial law clerk. Juliet was my student in the Immigration Appellate Advocacy Clinic this past semester. In short, she's terrific – intelligent, indefatigable, diligent, an excellent writer, a creative thinker, and deeply committed to her craft. She is a gem, and any judge would be lucky to have her.

In the clinic I taught, Juliet was engaged and incisive. She and another student were tasked with drafting and filing a brief, on a relatively short timeframe, representing a client before the Board of Immigration Appeals. Their work was top-notch. After Juliet and her partner submitted their brief, the nonprofit case manager who had referred the client to us was sufficiently impressed that she asked if she could pass the brief along to a practicing attorney to whom she had referred a different case, so that that lawyer could use Juliet's brief as a model and learn from its arguments.

It's not merely the case that Juliet has strong lawyering skills. She is also first in her class, with a grade point average topping the 3.9 mark. Her plain intelligence has served her well in both the classroom and the clinical environment. For all of her accomplishments, though, Juliet is humble, eager to learn, and a pleasure to be around.

Juliet couples her academic achievements with a deep grasp of the real world. For part of her law school career, she was simultaneously working full-time as a law firm case manager. Before that, she spent the better part of three years as in a demanding paralegal position addressing the immigration needs of an underserved community, and before that worked as a refugee resettlement case manager. That experience came on top of her master's degree from the University of Michigan, where again her grades were stellar.

Juliet will be a tremendous asset to any chambers she serves in -- I would have had no hesitation in recommending her to Ruth Bader Ginsburg (for whom I clerked many years ago). Federal judges have the opportunity to hire clerks from many law schools, some of them more prestigious than Wayne State. It would be a huge mistake, though, to pass over Juliet's application simply because she is not a student at Harvard or Michigan. In terms of sheer ability and commitment, I will gladly put her up against students from either of those schools, and I would hire her in preference to the vast majority of them. I recommend her without reservation.

Sincerely yours,

Jonathan Weinberg

Distinguished Professor of Law

Jonathan Weinberg - weinberg@wayne.edu